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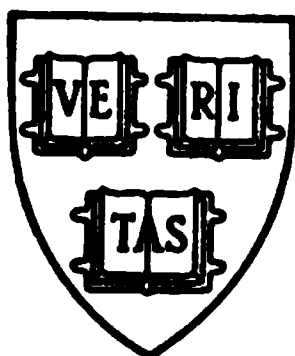
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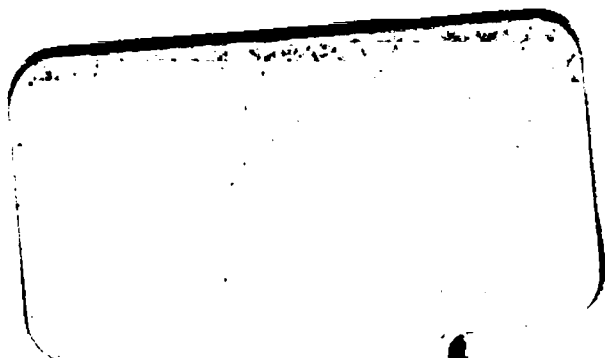
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THE ANNOTATED
PROBATE CODE
OF
OHIO.

BY
W. H. WHITTAKER,
(Of the Cincinnati Bar,)

EDITOR OF "OHIO ANNOTATED CODE OF CIVIL PROCEDURE,"
AND
"WHITTAKER'S SMITH ON NEGLIGENCE."

J. H. McKnight
CINCINNATI:

W. H. ANDERSON & CO.

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ABBREVIATIONS.

- Bull.*.....Weekly Law Bulletin.
C. C. R.....Circuit Court Reports of Ohio.
C. S. C. R...Cincinnati Superior Court Reporter.
Clev. Rep...Cleveland Reporter.
D......Disney's Cincinnati Superior Court Reports.
H......Handy's Cincinnati Superior Court Reports.
Rec......American Law Record.
W. L. G....Weekly Law Gazette.
W. L. J.....Western Law Journal.
W. L. M....Western Law Monthly.

PROBATE COURT.

JURISDICTION, POWERS, DUTIES, ETC.

Constitutional provisions. Election. Term of office of probate judge. There shall be established in each county, a probate court, which shall be a court of record, open at all times, and holden by one judge, elected by the voters of the county, who shall hold his office for the term of three years, and shall receive such compensation, payable out of the county treasury, or by fees, or both, as shall be provided by law. [Const. Art. IV, § 7.]

While probate judge he can not hold any other office. § 18 R. S.

Jurisdiction, generally. The probate court shall have jurisdiction in probate and testamentary matters, the appointment of administrators and guardians, the settlement of the accounts of executors, administrators, and guardians, and such jurisdiction, in *habeas corpus*, the issuing of marriage licenses; and for the sale of land by executors, administrators, and guardians, and such other jurisdiction, in any county or counties, as may be provided by law. [Const. Art. IV, § 8.]

Transfer of business to. The probate courts provided for in this constitution, as to all matters within the jurisdiction conferred upon said courts, shall be the successors in the several counties, of the present courts of common pleas; and the records, files, and papers, business and proceedings appertaining to said jurisdiction, shall be transferred to said courts of probate, and be there proceeded in, according to law. [Const. Sched. § 14.]

§ 523. Where probate court held, how furnished, etc. There is established in each county of this state a probate court, which shall be held at the county seat,

in an office in which shall be deposited and safely kept by the judge of the court all books, records and papers pertaining to the court; and such office shall be furnished by the county commissioners, and provided with suitable cases for the safe keeping and preservation of the books and papers of the court, and also with such blank-books, blanks, and stationery as are required by the judge in the discharge of his official duties. [51 v. 167, §1; 64 v. 72, § 13.]

§ 524. **Exclusive jurisdiction.** The probate court shall have exclusive jurisdiction, except as hereinafter provided:

1. To take the proof of wills, and to admit to record authenticated copies of wills executed, proved, and allowed in the courts of any other state, territory, or country; and in case of the sickness or unavoidable absence of the probate judge, any of the judges of the court of common pleas may take proof of wills and approve any bonds to be given, but the record of such acts shall be preserved in the usual records of the probate court.

2. To grant and revoke letters testamentary and of administration.

3. To direct and control the conduct and to settle the accounts of executors and administrators, and to order the distribution of estates.

4. To appoint and remove guardians, to direct and control their conduct, and to settle their accounts.

5. To grant marriage licenses, and licenses to ministers of the gospel to solemnize marriages.

6. To make inquests respecting lunatics, insane persons, idiots, and deaf and dumb persons, subject by law to guardianship.

7. To make inquests of the amount of compensation to be made to the owners of real estate when appropriated by any corporation legally authorized to make such appropriation.

8. To try contests of the election of justices of the peace.

9. To qualify assignees and appoint and qualify trustees and commissioners of insolvent debtors, con-

trol their conduct, and settle their accounts. [52 v. 103, § 2; 75 v. 836, §§ 1, 2.]

See constitutional provisions, *supra*.

1. §§ 5913-5993.
2. §§ 5994-6022.
3. §§ 6023, *et seq.*
4. §§ 6254-6334;
5. §§ 6334-6394.
6. §§ 702-714. 738-749.
7. §§ 6414-6453.
8. §§ 572-578.
9. §§ 6335-6393.

§ 525. Concurrent jurisdiction. The probate court shall have concurrent jurisdiction:

1. In the sale of lands on petition by executors, administrators and guardians, and the assignment of dower in such cases of sale.

2. In the completion of real contracts on petition of executors and administrators.

3. In allowing and issuing writs of *habeas corpus*, and determining the validity of the caption and detention of the persons brought before them on such writs.

4. Of all misdemeanors in the counties specified in § 6454. [75 v. 9, § 3; 75 v. 960, § 1.]

1. §§ 6136-6174.
2. §§ 5840-5862. Code of civil procedure.
3. §§ 5726-5753. Code of civil procedure.

§ 526. Probate judges may administer oaths, take acknowledgments and depositions. Probate judges may administer oaths in all cases where oaths are authorized by law, take the acknowledgment of deeds, mortgages, and other instruments of writing required by law to be acknowledged, and take depositions in all cases where the same are authorized to be taken by the laws of this state. [51 v. 167, § 4]

A reference can not be ordered by a probate court unless by consent of the parties to the reference and the referee. § 5215.

§ 527. Jurisdiction exclusive of that of any other probate court. The jurisdiction acquired by any probate court over a matter or proceeding, is exclusive of that of any other probate court, except where otherwise provided by law. [51 v. 167, § 5.]

§ 528. Books to be kept by probate court. The following books shall be kept by the probate court, and

blank books for the purpose shall be procured by the county commissioners on the order of the probate judge, at the expense of the county:

1. A criminal record, in which shall be made a fair and accurate entry of all criminal actions instituted in the court, with the proceedings had therein.

2. An administration docket, showing the grant of letters of administration or letters testamentary, the name of the decedent, the amount of bond and names of sureties therein, and containing a minute of the time of filing every paper, and brief note of every order or proceeding relating to the estate, with reference to the journal or record in which the order or proceeding is found.

3. A guardians' docket, showing the name of each ward (and if an infant, his age, and the name of his father), the amount of bond and names of sureties therein, and a minute of papers, orders, and proceedings as in preceding clause.

4. A civil docket, in which shall be noted the names of parties to all actions and proceedings; it shall also contain a minute of the time of the commencement of such actions and proceedings, and filing the papers relating thereto, and also a brief note of all orders made in such action, proceeding, or matter, and the time of entering the same.

5. A journal, in which shall be kept minutes of all official business transacted in the probate court, or by the probate judge, in all civil actions and proceedings.

6. A record of wills, in which shall be recorded all wills proved in such court, with a certificate of the probate thereof, and all wills proved elsewhere, with the certificate of probate, authenticated copies of which have been admitted to record by the court.

7. A final record, which shall contain a complete record in each cause or matter of all petitions, answers, demurrers, motions, returns, reports, verdicts, awards, orders, and judgments; which record shall be made up and completed within ninety days after the final order or judgment has been made in any of the matters aforesaid; and he shall also, within thirty days after the return of same, record all

inventories, sale bills, and allowances to widows, in a book provided for that purpose.

8. A record of accounts, which shall contain an entry of the appointment of executors, administrators, and guardians, and all partial and final accounts of the same, and the orders and proceedings of the courts thereon, within sixty days after the filing and approval thereof.

9. An execution docket, in which shall be entered a memorandum of all executions issued by the probate judge, both in civil and criminal cases, stating the names of the parties, the name of the person to whom delivered, and his return thereon: It shall also contain the date of issuing the execution, and the amount ordered to be collected, stating the costs separately from the fine or damages, and the payments thereon, and the satisfaction thereof, when the same is satisfied.

10. A marriage record, in which shall be entered all licenses issued, the names of the parties to whom, the name of the person or persons applying for the same, with a brief statement of any facts sworn to by such person, and the return of the person solemnizing the marriage.

11. A record of bonds, in which shall be recorded all bonds of executors, administrators, guardians, trustees, and assignees which have been taken and approved by him.

12. A naturalization record, in which shall be entered the declaration of intention of the person seeking to be naturalized, the oath of the person naturalized, and the affidavit or oath of witnesses who may testify in his behalf, in which affidavit shall be stated the place of residence of such witnesses. To each of these books shall be attached an index, securely bound in the volume, which shall at all times be kept up with the entries therein, and refer to such entries alphabetically, by the names of the parties or persons in which it is originally entered, indicating the page of the book where the entry is made. [51 v. 167, § 12; 38 v. 146, § 244; 75 v. 9.]

§ 528a. **Lost or destroyed Records. How restored.** Whenever the records, dockets, journals, and files, or

any part thereof, of any probate court, have been lost or destroyed by fire, riot, or civil commotion, the probate court may, of its own motion, or upon the application of any party interested therein, order the restoration of the record of every lost or destroyed will, and probate thereof, from the original or a certified copy of such will and probate, and all lost or destroyed administration dockets, guardian dockets, trustee dockets, journals of said court, records of bonds, and dockets of assignments and trustees under the insolvent laws of the state; and said probate court may upon the application of any party interested, and upon notice to parties interested therein, order the restoration of any other record of any proceeding or document required by law to be recorded or filed, (except a will and probate thereof), and for such purpose when a complete copy of such record can not be obtained, the substance and effect of such lost record material to the preservation of the rights of the parties affected thereby may be ordered to be substituted for such lost or destroyed record. And for the purpose herein provided the probate court may issue a citation to any party to appear before the court and to produce any document or paper in his possession and give evidence relating to said lost record. [81 v. 161.]

Application for restoration of record of naturalization.

PROBATE COURT—COUNTY.

In re-application of A. B. for the restoration of the record of his naturalization as a citizen of the United States.

To the Hon.—Probate Judge of said County:

The undersigned represents that he is a native of—aged about—years; that he emigrated from—on the—day of—18—, and arrived at—on the—day of—18—; that on or about the—day of—188—he made his declaration of intention to become a citizen of the United States of America, and took the oath prescribed by act of Congress, in the probate court of—County, Ohio, and received a certified copy of said declaration which—that on or about the—day of—18—he was naturalized in the probate court of—County, Ohio, and received a certified copy of said naturalization, which,—that the record of said naturalization (a substituted copy of which is hereunto attached marked exhibit A.) was destroyed by fire in the burning of the Court House March 29, 1884, and he asks that said record be restored by order of the court.

State of Ohio—County, ss. A. B. the applicant being first

duly sworn on oath says that he believes the facts stated in his foregoing application are true. A. B.

Sworn to before me and signed in my presence this——day of——188—

UNITED STATES OF AMERICA.)

State of Ohio——County, *Probate Court*.)

Be it remembered that at a session of the probate court within and for said county, held at the court house in——on the——day of——in the year of our Lord one thousand eight hundred and——before the Hon.——sole judge of said court, personally came A. B., a native of——and produced a certificate under seal, that on the——day of——A. D. 18—he declared his intention to become a citizen of the United States of America before the——agreeably to Act of Congress in such case made and provided, and proved his residence and character by the oath of——and being admitted to citizenship by this court, took the oath to support the constitution of the United States of America, and that he then did absolutely and entirely forever renounce and abjure allegiance and fidelity to every foreign prince, potentate, state or sovereignty whatsoever, and particularly to the——.

This is therefore to certify that the said A. B. has complied with the laws of the United States in such case made and provided, and is therefore admitted a citizen of the United States.

In testimony whereof, I——probate judge and *ex officio* clerk of said court, have hereunto set my hand, and affixed the seal of the said court at——this——day of——A. D. 18—
——probate judge and *ex officio* clerk.

§ 528b. Judge to make rules as to testimony and appoint commissioner. To enable the court to make such restoration of such lost record, the judge of the probate court may make such rules and regulations governing the proceedings for taking testimony and ascertaining the facts with reference to the restoration of such lost or destroyed records as he may deem necessary for that purpose, and if such records are lost by fire, riot or civil commotion, may appoint a commissioner to take testimony and report the same and his findings thereon, in matters of restoration of such lost records, before whom all such evidence shall be taken, unless upon the application of the parties a reference shall be ordered to a special master commissioner, in which case the costs of reference shall be paid by the parties. And such commissioner appointed by the court shall be paid a salary of twenty-five hundred dollars per annum and hold his office for one year from the date of his appointment. [81 v. 162.]

Reference —[Title.] On motion and for good cause shown the application in the above cause is referred to——who is

hereby appointed commissioner for the purpose of taking testimony therein and to report his findings to this court.

Finding.—[Title.] To the Hon.——judge of the probate court of——County, Ohio. The aforesaid application having been referred to me for hearing and report, I examined on oath A. B. whose testimony is herewith filed, and being fully advised, I find and report as follows:

1. I find that the application was filed according to law.
2. I find that A. B. was duly naturalized according to law on the——day of——18——in the probate court of——county, whereof he received a certified copy which he has lost.
3. I find that the record thereof was destroyed by fire in the burning of the court house, March 29, 1884, and I further find that said record ought to be restored as prayed for in said application. All of which is respectfully submitted.
——188——Commissioner.

Final entry.—[Title.] The above mentioned application coming on to be heard on the motion to confirm the findings and report of the commissioner of the probate court heretofore filed, and the court having examined said application and the findings and report aforesaid, and being fully advised, approves said findings and report, and orders that said record be, and the same is hereby restored as prayed for in said application.

Rules of Hamilton County Probate Court in relation to restoring lost records, etc.

I. The application for the restoration of the record of any proceeding or document required by law to be recorded or filed (except wills) or for the restoration of the entries on administration dockets, guardian dockets, trustee dockets, records of bonds and dockets of assignments and trustees, under the insolvent laws of Ohio, or journal entries lost or destroyed by fire, riot or civil commotion shall be in writing, signed and sworn to by the applicant and filed in the probate court.

II. Said application shall have attached to it a true copy of the record, proceeding or document, docket entries or journal entries proposed to be restored, or if a copy of the same can not be made, then a substantial copy thereof shall be so annexed; and it shall state the number of the original case, docket entry or proceeding if known, and it shall state, in an application to restore the record of a proceeding or document required by law to be recorded or filed, or of journal entries, the names and residences of all parties interested or whose rights will be immediately affected by such restoration; and in case of an administration, the names and residences of the widow or next of kin; in case of guardian or trusteeship, the name and residence of the ward or *cestui que trust*; and in case of assignments and trustees under the insolvent laws, the names and residences of at least three of the principal creditors of the estate residing within the jurisdiction of the court.

III. On applications for the restoration of judgments and all other proceedings where, by the statute, the original service must be by summons, the notice of said application shall be by summons issued, and actual service or service by publication made in the manner provided by law for the commencement of civil actions.

In all other cases, notice shall be by citation which shall

briefly state the object of said application and specify the record, entry, judgment, or docket entry asked to be restored, and shall name a day for hearing said application, which shall not be less than twenty days after the filing of said application, and not less than ten days from the date of the return of said citation.

In case of non-residents, service of citation shall be made by publication as provided in § 6196 R. S.

IV. If the application aforesaid be accompanied with a written agreement signed by all parties in interest or their representatives or attorneys consenting to the restoration of said record, proceeding, document or docket and journal entries, no notice shall be required.

V. The parties interested in said record, proceeding, docket or journal entries may at or before the time fixed for said hearing file exceptions to the restoration of the same, specifying therein each item or part thereof objected to.

VI. On the day mentioned in said notice or summons, the application and where exceptions have been filed, the application together with the exceptions shall be referred to the Commissioner of the probate court or (to such other commissioner the parties may agree upon as provided by statute), to examine the same and hear the testimony offered, and make his findings, and report the same together with the testimony, to the probate court as provided by law.

All testimony must be reduced to writing, and signed by the witnesses.

HERMAN P. GOEBEL, *Probate Judge*.

§ 528c. **Costs of restoring records. How paid.** The costs of restoring the records of the probate court except as herein otherwise provided, shall be paid out of the county treasury, upon the order of the probate judge. [81 v. 162.]

§ 529. **Bond of probate judge. Condition.** Deposited with county treasurer. Before any probate judge enters upon the discharge of his duties, he shall give a bond to the state, with sufficient security, to be approved by the board of county commissioners of the proper county, or, in the absence of any two of the commissioners from the county, by the auditor and recorder of the proper county, in any sum not less than five thousand dollars, to the effect that he will faithfully pay over all moneys that are by him received in his official capacity, that he will enter and record all the orders, judgments, and proceedings of the court, and faithfully and impartially perform all the duties of his office; which undertaking, with his oath of office indorsed thereon, shall be deposited with the county treasurer; and such additional undertaking may be required by the county commissioners from the pro-

bate judge, from time to time, as the state of business in his office renders necessary. [51 v. 167, § 6.]

§ 530. On probate judge taking his office, he shall make all entries, records, etc., omitted by his predecessor. If, when a probate judge, whether elected or appointed, enters upon the discharge of his duties, proper and necessary entries and records of the business, or any portion thereof, transacted in the court, during the continuance in office of any former judge thereof, had not been made, as required by law, by the probate judge whose duty it was to make such entries or records, the probate judge shall make, in the respective books of his office, the proper records, entries, and indexes, so omitted by his predecessor or predecessors in office; and when so made, they shall have the same validity, force and effect, as though they had been made at the proper time, as prescribed by law, and by the officer whose duty it was to make them; and such probate judge shall sign all entries and records made by him, as aforesaid, as though such entries, proceedings, and records had been commenced, prosecuted, determined and made by or before him, [69 v. 160, § 1; 62 v. 33, § 2; 70 v. 85, § 1.]

§ 531. Fees paid to predecessor for services performed by probate judge. For all services performed under the next preceding section, in making such records, entries, or indexes, the probate judge shall receive the same fees as are allowed by law for like services; and in all cases when the fees allowed by law for such services have been paid to any predecessor of such probate judge, whose duty it was to make such entries, records, and indexes, such fees shall be paid to the probate judge making them, out of the treasury of the proper county, upon the order of the county auditor. [62 v. 33, § 3; 70 v. 85, § 1.]

§ 532. Judge shall make sworn statement of such services, thereupon prosecuting attorney shall bring suit against predecessor for same. On the completion of such services, the probate judge shall make out and certify to the county auditor, a written statement of the same, the respective causes or matters in which they have been rendered, the fees to which he is en-

titled for them, that such fees have been paid to his predecessor, naming him, and that he has received no compensation whatever for such services, or less than full compensation thereof, which written statement shall be verified by the affidavit of the person making it, and thereupon the auditor shall issue a warrant on the county treasurer for such sum as he finds to be due to such judge for these services; and thereupon the prosecuting attorney of the county shall bring suit on the official bond of the probate judge who has received the fees for and failed to perform the duties aforesaid, for the purpose of recovering back the money thus paid out of the county treasury, and when so collected, shall pay the same into the treasury of such county. [62 v. 33, §§ 4, 5.]

§ 533. Custody of files. Judge may act as clerk or appoint a deputy. Oath of deputy. His powers and bond. Each judge shall have the care and custody of all files, papers, books and records, belonging to the probate office, and is authorized and empowered to perform the duties of clerk of his own court; and each probate judge may appoint a deputy clerk or clerks, each of whom shall, before entering upon the duties of his appointment, take an oath of office, and when so qualified, such deputy may perform any or all the duties appertaining to the office of clerk of the court; and each deputy clerk is authorized to administer oaths in all cases in which it is necessary, in the discharge of his duties as such deputy clerk. Each probate judge may take such security from his deputy as he deems necessary to secure the faithful performance of the duties of his appointment. [56 v. 169, § 10.]

Deputy clerk may be a female and she may administer oaths pertaining to the office, 25 O. S. 21. Can not administer oath after expiration of term of appointment, 89 O. S. 496.

§ 534. No probate judge or his deputy to practice law, etc. No judge of a probate court, or any deputy clerk employed by him, or who is engaged in the business of such court as clerk thereof, shall, during the term of his office, or employment, practice law, or be associated with another as partner in the practice of law, in any of the courts or other tribunals of this state;

neither shall such judge or clerk prepare any petition or answer, or make out any account which any executor, administrator, guardian, or other person is required to present for the settlement of the estate committed to his care and management; nor appear as counsel or attorney before any justice of the peace, or before any court or other judicial tribunal in the state; nor shall such judge or deputy clerk make a record of any paper, receipt, or voucher, produced to verify any charge or credit in the account, filed or presented for settlement as aforesaid, unless the recording thereof is requested in writing by the party making such settlement; but nothing contained in this section shall prevent any probate judge or deputy clerk, aforesaid, from finishing any business by him commenced prior to his election or appointment, not connected with his official business; and if any judge of the probate court or any deputy employed by him, wilfully violates any provisions herein prohibiting him from practicing law in any of the ways specified, such judge or deputy clerk shall be fined in any sum not exceeding fifty dollars, and, upon conviction thereof, shall be removed from office; and the prosecuting attorney is hereby required to file his information against such judge or deputy clerk in the court of common pleas, and proceed as upon indictment. [77 v. 183.]

§ 535. Administration, etc., when the probate judge is interested. Letters testamentary, or of administration, or of guardianship, shall not be issued to any person after his election to the office of probate judge and before the expiration of his term of office; and if a probate judge is interested, as heir, legatee, devisee or in any other manner in any estate which would otherwise be settled in the probate court of the county where he resides, such estate, and all accounts of guardians in which the probate judge is interested, shall be settled by the court of common pleas of such county; and in all such matters and cases in which the probate judge is interested, the original papers shall be by him forthwith certified to the court of common pleas; and in all other matters and proceed-

ings, pending in any probate court, which would properly be disposed of or decided therein, but in which the probate judge thereof is interested, in any manner whatever, as attorney or otherwise, or in which he is required to be a witness to a will, such probate judge shall, upon the motion of a party interested in such proceedings, or upon his own motion, certify the matters and proceedings to the court of common pleas, and he shall forthwith file with the clerk of the court of common pleas all original papers connected with the proceedings, and the same shall be proceeded in and heard and determined by the court of common pleas, at chambers, by any judge thereof, or in open court, in the same manner as though that court had original jurisdiction of the subject matter thereof, and upon the final decision of the questions involved in such proceedings, or on the final settlement of the estate in which the judge is interested as executor, administrator or guardian, by the court of common pleas, or whenever the interest of the probate judge therein ceases, the clerk shall deliver all the original papers back to the probate court, from which they came, and the clerk shall, also, make out an authenticated transcript of the orders, judgments and proceedings of the court therein, and shall file the same in the probate court from which the papers came, and the judge thereof shall record the same in the ordinary records of similar business. [75 v. 9, § 1.]

§ 536. Judges shall make rules of practice and submit them to the supreme court. The several judges of the probate court shall make rules, not inconsistent with the laws of the state, for regulating the practice and conducting the business of the court, which they shall, when and as often as they are made, submit to the supreme court; and the supreme court has power to alter and amend all such rules, and to make other and further rules, from time to time, for regulating the proceedings in all the probate courts of the state, as they deem necessary, in order to introduce and maintain regularity and uniformity in the proceedings therein. [51 v. 167, § 14.]

§ 537. Shall have same powers, and observe rules of common pleas so far as applicable. In the exercise of the jurisdiction conferred, the probate judge shall have the same powers, perform the same duties, and be governed by the same rules and regulations as are provided by law for the courts of common pleas and the judges thereof, in vacation, so far as the same are consistent with laws in force. [51 v. 167, § 58.]

§ 538. Power to punish contempt. The probate judge shall have power to keep order in his court, and to punish any contempt of his authority, in like manner as such contempt might be punished in the court of common pleas. [51 v. 167, § 59.]

§ 539. And to issue process, etc. He shall issue all warrants, attachments, and other process, and all notices, commissions, rules and orders, not contrary to law, that are necessary and proper to carry into effect the powers granted to him. [51 v. 167, § 60.]

§ 540. Duties of sheriff, coroner, and constable. Sheriffs, deputy sheriffs, coroners and constables shall, when required by the probate judge, attend his court, and shall serve and return all process directed to them by the judge. [51 v. 167, § 61.]

The probate court in any county containing a city of the first grade of the first class may on the application of the sheriff of the county, appoint one or more constables at a salary of \$800 per annum, payable out of the county treasury, on the order of the court. [81 v. 22.]

§ 541. Liability of sheriff, etc. If a sheriff, coroner or constable, neglects or refuses to serve and return a process issued by a probate judge, and to him directed and delivered, or neglects or refuses to pay over any moneys by him collected to the probate judge, or any other person, when so directed by such probate judge, he shall be subject to a fine and amercement as in the next section provided. [51 v. 167, § 17.]

§ 542. How proceeded against. In the cases enumerated in the preceding section, the probate judge shall issue a summons, directed to the sheriff or other officer therein named, commanding him to summon the officer guilty of such misconduct, to appear within two days after the service of such summons, and

show cause why he should not be amerced, specifying the cause for such amercement; and in case of neglect or refusal to serve or return any process issued by such probate judge, and directed and delivered to such officer, if no sufficient excuse is shown, such officer shall be fined by the probate judge in any sum not exceeding one hundred dollars, to be paid into the county treasury; and he and his sureties shall moreover be liable upon his official bond for all damages sustained by any person by reason of such misconduct; and in case of refusal to pay over any moneys by him collected to the probate judge or any other person, when so directed by such probate judge, he shall be amerced for the use of the parties interested, in the amount by such process required to be collected, together with ten per cent. thereon; and such probate judge may enforce the collection thereof by execution or other process; or by imprisonment, as for a contempt of court, or both; the delinquent officer and his sureties shall, moreover, be liable on his official bond for the amount of such amercement at the suit of the person or persons interested. [51 v. 167, § 18.]

See § 5594, *et seq.* Annotated code of civil procedure.

§ 543. When person guilty of contempt. How punished. If any person neglects or refuses to perform any order or judgment of a probate court other than for the payment of money, he shall be deemed guilty of a contempt of court, and the probate judge shall issue a summons directing him to appear before his court within two days, from the service thereof, and show cause why he should not be punished for his contempt; or if it appear to such judge that he is secret-ing himself to avoid the process of the court, or is about to leave the county for such purpose, the judge may issue an attachment instead of the summons above mentioned, commanding the officer to whom the attachment is directed forthwith to bring such person before such judge to answer for his contempt; and if no sufficient excuse is shown, he shall be punished in the same manner as provided for the punishment of contempts in the court of common pleas. [51 v. 167, § 16.]

"Other than for the payment of money." 42 O. S. 109.

"As provided for the punishment of contempts in the court of common pleas." §§ 5639-5650, Annotated code of civil procedure.

§ 544. **Executions.** Orders for the payment of money may be enforced by execution or otherwise, in the same manner as judgments in the court of common pleas; and all such executions shall be directed to the sheriff, or, in his absence or disability, to the coroner. [51 v. 167, § 15.]

§ 545. **Fee bill and report of fees.** Each probate judge shall, in every case, examination, or proceeding, make out, file, and record an itemized account of all fees by him received or charged therein; and on the first day of September, in each year, he shall make out and file with the auditor of his county an account, by him duly verified, of all fees by him charged or received during the next preceding year, distinguishing between those paid and those not paid; and if he fails or neglects to perform the duties in this section imposed, he shall forfeit and pay, for each instance of such failure or neglect, any sum not less than ten nor more than two hundred dollars, to be recovered by action in the name of the state, which shall, at the instance of any person, be instituted and prosecuted by the prosecuting attorney. [64 v. 42, §§ 1, 2, 3.]

§ 546. **Fees of probate judge.** Each probate judge in this state shall receive, for services rendered, the fees herein provided, and no more:

Docketing each case, to be charged but once, .04.

Entering the appearance of parties, to be charged but once, in each case, .08.

Taking affidavit, .10.

Issuing summons or other writs under seal, .25 each.

Entering order to advertise, .20.

Filing any papers except accounts current and vouchers of executors; administrators, and guardians, .04 each.

Entering the return of any writ, .04.

Issuing a subpoena when there is but one witness named, .10.

- And for every additional name, .04.
Swearing each witness, .03.
Entering attendance of each witness, .05.
Indexing each cause, .08.
Entering judgment on journal, .08.
Recording general verdict, .08.
Entering order on journal, .08.
Each one hundred words for transcribing judgment or orders on the docket, .08.
Entering satisfaction of judgment or decree on record, .08.
Entering every special rule, .04.
Entering every continuance or dismissal, .08.
Entering rule of reference, .08.
And for a copy thereof, under seal, .20.
Entering notice of appeal, .08.
Making cost bill, which shall be taxed but once, .25.
Making up complete record in cause, for each one hundred words, .08.
But no complete record shall be made in any case except when the title of real estate is drawn in question, the court may order the same, or either party may require it, at his own cost.
Making out copies or records of any proceedings in a cause, when required by either party or the law, with a seal annexed, for each hundred words .08.
Entering an allowance of an injunction, *certiorari*, or *habeas corpus*, .08.
Issuing execution, .25.
Docketing each execution issued, .08.
Issuing order of sale, .25 and for every hundred words said writ may contain over the first hundred, .08.
Recording returns on writs of execution and orders of sale, for each hundred words .08.
Each certificate to which the seal of the court is required and not herein provided for, .35.
Probate of will and entry thereof, .30.
Issuing letters testamentary, or letters of administration or guardianship, under seal of court, .75.
Taking bond of executors, administrators, or guardians, .25.
Recording a bond, will, inventory, sale bill, or set-

tlement of executors administrators, or guardians, for every hundred words, 03.

Making out copies of wills, inventories, sale bills, settlements, or rules of court ordered to be furnished by executors and guardians, for each hundred words, .08.

Entering the appointment of executors, administrators, or guardians, or appraisers of property, .10.

Copy of order to appraisers, .10.

Filing an account, warrant, and vouchers, of an executor, administrator, or guardian for settlement and entering the same on the minutes of the court, .15.

Entering order of settlement of same, .12.

Examining partial or final settlements of guardians, executors, or administrators, .75 each.

Where there are not more than fifty vouchers to be examined, and if any account shall contain more than fifty vouchers, for each additional voucher so examined, the sum of .02.

Issuing citation to executors, administrators, or guardians, .25.

Administering an oath when necessary, and issuing a marriage license and filing and recording the certificate of marriage, .75.

Giving notice of time of settlement, .08.

Hearing application on behalf of idiots and lunatics, \$1.50.

Hearing application for the right of way of railroads, plank roads, and turnpikes, or road appeals, \$2 per day

Hearing and deciding application in contested cases, on petition of administrators, guardians, or executors to sell land, and petitions to convey. to be taxed in each of the above cases in the bill of costs, .5.

Holding examining courts, \$2 per day.

Hearing and determining applications on *habeas corpus* in criminal cases, to be paid out of the county treasury, \$1 50.

Hearing and determining applications for *habeas corpus* in civil cases, .75

Hearing and determining applications in contested

cases, to be taxed in the bill of costs against the unsuccessful party. \$1.50.

For the registry of births and deaths, the sum of .08 for the registry of each birth, and each death returned to his office, but no other compensation for any indexing or recording, or any other service whatever that is necessary to complete the records or reports required. [73 v. 127, §§ 1. 2; 76 v. 117, § 13.]

§ 547. Same fees as common pleas for services not herein provided for. For any other services not herein provided for, the same fee shall be allowed as for similar services in the court of common pleas [73 v. 127, § 3; 76 v. 117, § 14.]

§ 548. Costs of criminal proceedings, duty in pension cases. The costs in all criminal proceedings taxed and adjudged in favor of the state, shall, when collected by the probate judge, be paid by him into the county treasury; and he shall administer oaths, and make certificates in pension and bounty cases, without compensation. [73 v. 127, § 4.]

PROCEEDINGS IN RELATION TO JUSTICES OF THE PEACE.

§ 568. Probate Judge may change number of justices in township. When it is made to appear to the satisfaction of the probate judge of the proper county, that there is not a sufficient number of justices of the peace in any township thereof, and, also, that public notice had been given in such township that application would be made for an additional number of justices of the peace, the court is authorized to add one or more justices to such township, as seems just and proper, and the trustees shall give notice to the electors of such township to elect such justice or justices so added, agreeably to the provisions of § 567; and when it is made to appear to the court aforesaid, that it is expedient to decrease the number of justices in any township, the court is authorized to restrict the number as it judges proper; but no justice may be

deprived of his commission until the expiration of the term for which he was elected; and if a part of any township is attached to any other township, the justices of the peace residing in the limits of that part of the township so attached, as aforesaid, shall execute the duties of their office in the township to which the same is attached, in the same manner as if they had been elected for such township. [51 v. 406, § 3.]

Notice of election, duty of Clerk of common pleas.

When a vacancy occurs in the office of justice of the peace in any township in the state, either by death, removal, absence at any one time for the space of six months, resignation, refusal to serve, or otherwise, the trustees having notice thereof, shall give notice to the electors of such township to fill such vacancy, by setting up advertisements in three public places in the township, specifying the number of justices to be elected, and the time of such election; which notice shall be given not less than fifteen nor more than twenty days previous to holding such election, which shall be held at the usual place of holding elections; and the clerk of the court of common pleas in certifying to the secretary of state the election of a justice of the peace to fill any vacancy, as aforesaid shall specify in his certificate the name of the justice of the peace whose place is supplied by the person whose election is certified to, and also the date when such vacancy occurred; and to enable the clerk of the court to comply with so much of this section as relates to his duties, the trustees shall notify him of any vacancy, as aforesaid, and the date when it occurred; and in case the election of an additional justice of the peace in any township is authorized by the proper authority, the clerk of the court, in certifying his election to the secretary of state, shall state in his certificate that he is such additional justice of the peace so authorized and elected. § 567.

Journal entry.—In the matter of increasing [or diminishing] the number of justices in——township——county, Ohio, Probate Court——county.

It appearing to the court on the application of A. B. *et. al.*, that there is not a sufficient [or, it appearing to the court that it is expedient to decrease the] number of justices in said township, and that public notice has been given, according to law of this application, it is ordered that two additional justices of the peace be elected and qualified in said township [or, it is ordered that the number of justices in said township be decreased one.]

§ 572 Manner of contesting elections of justices of the peace. If any candidate, or elector, of the township in which the election was held, thinks proper to contest the election of the person or persons declared elected, such candidate or elector must make it known to the probate judge of the county within ten

days after the day of such election, and the points on which the contestor means to contest such election, and the judge shall communicate the same to the person or persons whose election is contested, specifying the name of the contestor, with the points on which he relies, citing him or them to appear on a day not more than fifteen days from the day of the election, at his office, in his county, allowing such person or persons five days' notice of the contest; and the judge shall also direct the clerk of the court of common pleas to withhold the return of such contested election until the same is decided. [51 v. 406, § 4.

To the Hon.—— Judge of the Probate court——county, Ohio:

The undersigned hereby notifies you, that he is an elector of——township, in said county [and was a candidate for the office of justice of the peace, at the election held therein on ——] and that he contests the election of ——, who has been declared elected a justice of the peace at the election held in said township, on the——day of——, 18—, upon the following grounds, to-wit: [*State the grounds.*]

He prays that such proceedings may be had as are authorized by law, and that said office may be declared vacant.

Dated ——,

A. B.

Notice by Probate Judge to contestee:—To ——,

You are hereby notified that A. B. contests your election as justice of the peace in —— township, in said county, to which office you have been declared elected, at the election held in said township on the——day of ——, 18—, upon the following grounds. [*State the grounds.*]

You will appear at my office, in —— at —— o'clock, — M. on —— [*within fifteen days from election*], when said contest will be heard.

Witness my signature and the seal of said court at——this day of ——18—

[SEAL.]

——Probate Judge.

§ 573. Probate judge shall select jury of three and have them summoned. Service. Return.

The judge, on the same day that he issues a notice to the person or persons whose election is contested, shall appoint three respectable freeholders of his county, not resident in the township in which such election was held, to try such contest, and shall issue a summons to said freeholders, directing them to appear and try the contest on a day spec-

ified in the summons, which summons shall be directed to the sheriff, or any constable of the county, and shall be served by the officer to whom directed, at least three days before the time appointed for the trial of the contest, and shall be by said sheriff or constable, as the case may be, returned at the time and place of trying the same. [51 v. 406, § 5.]

§ 574. **Witnesses.** The judge may, on the request of the contestor, or the person or persons whose election is contested, grant subpoena for witnesses directed to the sheriff or any constable of his county, who shall serve and return the same to the judge, at the time and place therein named. [51 v. 406, § 5.]

§ 575. **Jury sworn. Evidence. Verdict, and its transmission, etc.** The jury of freeholders shall be sworn to try such contest agreeably to evidence, and no evidence shall be admitted but such as relates to the points stated in the notice, and when the trial has closed, the freeholders shall sign their decision, which shall be attested by the probate judge; and if, by such decision there is a vacancy in the office of the justice of the peace, the judge shall, within three days thereafter, transmit a copy of such decision to the trustees of the township, or the clerk thereof if there are no trustees, who shall forthwith give notice to the electors to fill such vacancy as in other cases; but if, by the decision, the election remains good, he shall transmit the same to the clerk of the court of common pleas, who shall immediately proceed as if no contest had taken place. [84 v. 44.]

§ 576. **Election not to be set aside for illegal votes cast. When.** No election of a justice of the peace shall be set aside by the freeholders merely because illegal votes have been given at such election, if it appears that the person whose election is contested has the greatest number of the legal votes given at such election, after deducting all illegal votes given, when there is no evidence for whom such illegal votes were given, as well as all illegal votes which are shown to have been given for the person whose election is contested. [51 v. 406, § 8.]

ings, pending in any probate court, which would properly be disposed of or decided therein, but in which the probate judge thereof is interested, in any manner whatever, as attorney or otherwise, or in which he is required to be a witness to a will, such probate judge shall, upon the motion of a party interested in such proceedings, or upon his own motion, certify the matters and proceedings to the court of common pleas, and he shall forthwith file with the clerk of the court of common pleas all original papers connected with the proceedings, and the same shall be proceeded in and heard and determined by the court of common pleas, at chambers, by any judge thereof, or in open court, in the same manner as though that court had original jurisdiction of the subject matter thereof, and upon the final decision of the questions involved in such proceedings, or on the final settlement of the estate in which the judge is interested as executor, administrator or guardian, by the court of common pleas, or whenever the interest of the probate judge therein ceases, the clerk shall deliver all the original papers back to the probate court, from which they came, and the clerk shall, also, make out an authenticated transcript of the orders, judgments and proceedings of the court therein, and shall file the same in the probate court from which the papers came, and the judge thereof shall record the same in the ordinary records of similar business. [75 v. 9, § 1.]

§ 536. Judges shall make rules of practice and submit them to the supreme court. The several judges of the probate court shall make rules, not inconsistent with the laws of the state, for regulating the practice and conducting the business of the court, which they shall, when and as often as they are made, submit to the supreme court; and the supreme court has power to alter and amend all such rules, and to make other and further rules, from time to time, for regulating the proceedings in all the probate courts of the state, as they deem necessary, in order to introduce and maintain regularity and uniformity in the proceedings therein. [51 v. 167, § 14.]

§ 703. **Warrant and subpoenas.** When hearing may be had in absence of alleged lunatic. When the affidavit is filed, the probate judge shall forthwith issue his warrant to some suitable person, commanding him to bring the person alleged to be insane before him, on a day therein named, which shall not be more than five days after the affidavit has been filed, and shall immediately issue subpoenas for such witnesses as he deems necessary (one of whom shall be a respectable physician), commanding the persons in such subpoenas named to appear before the judge on the return day of the warrant; and if any person disputes the insanity of the party charged, the probate judge shall issue subpoenas for such person or persons as are demanded on behalf of the person alleged to be insane; provided that if, by reason of the character of the affliction or insanity of said person, it is deemed unsuitable or improper to bring the person into such probate court, then the probate judge shall personally visit said person and certify that he has so ascertained the condition of the person by actual inspection, and all proceedings as herein required, may then be had in the absence of such person. [75 v. 64 § 20.]

State of Ohio, _____ county, ss. probate court.:

To N. B., sheriff of said county (*or some suitable person*): You are hereby commanded to have the body of T. E., who resides at _____, alleged to be insane, before me _____, probate judge in and for said county. at the court house in _____, on the _____ day of _____, A. D. 188 , at—o'clock, —M.

And to this writ make due return.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at _____, this—day of _____, A. D., 188 . _____, probate judge.

[SEAL.]

By _____, deputy clerk.

Returned to court the person named in above warrant. _____.

_____, 188 .

§ 704. **Hearing; certificate of medical witness.** At the time appointed (unless for good cause the investigation is adjourned) the judge shall proceed to examine the witnesses in attendance; and if, upon the hearing of the testimony, he is satisfied that the person so charged is insane, he shall cause a certificate to be made out by the medical witness in attendance, which shall set forth the following:

1. Name of patient, with christian name at length.
2. Sex, age, married, single, or widowed.
3. Condition of life and previous occupation, if any.
4. Religious persuasion, so far as known.
5. Previous place of abode.
6. Whether first attack.
7. Age (if known) on first attack.
8. When and where previously under treatment.
9. Duration of existing attack.
10. Supposed cause.
11. Whether subject to epilepsy.
12. Whether suicidal.
13. Whether dangerous to others.
14. Facts or symptoms indicating insanity observed by examining physician.
15. Physical causes.
16. Moral causes.
17. Predisposing causes.
18. Habits of patient.
19. Habits of parents.
20. Hereditary, or not.
21. Whether patient is free or not from any infectious disease. [75 v. 64, § 21].

The certificate must state whether the patient is free from infectious disease and vermin, see § 705.

§ 705. Application to the superintendent. Warrant to admit a patient. Conveyance to asylum. When application may be refused. Right of relatives to keep patient. The probate judge, upon receiving the certificate of the medical witness, made out according to the provisions of the preceding section, shall forthwith apply to the superintendent of the asylum for the insane, situated in the district in which such patient resides; he shall, at the same time, transmit copies, under his official seal, of the certificate of the medical witness, and of his finding in the case; upon receiving the application and certificate, the superintendent shall immediately advise the probate judge whether the patient can be received. and, if so, at what time; the probate judge, when advised that the patient will be received,

shall forthwith issue his warrant to the sheriff, or any other suitable person, commanding him to forthwith take charge of and convey such insane person to the asylum; if the probate judge is satisfied from proof, that an assistant is necessary, he may appoint one person as such assistant; provided, if such insane person be a female, the probate judge shall appoint a suitable female assistant to accompany said sheriff and such insane person to the asylum. The warrant of the probate judge shall be substantially as follows:

The State of Ohio, ——— county, ss.:

Office of the probate judge of said county:

To ———;

All the proceedings prescribed by law to entitle ——— to be admitted into the asylum for the insane having been had, you are commanded forthwith to take charge of and convey said ——— to the asylum for the insane at ———, and you are authorized to take ———, as assistant: after executing this warrant, you will make due return thereof to this office.

Witness my hand and official seal, this — day of —, A. D. —.

———,
probate judge.

Upon receiving such patient, the superintendent shall indorse upon the warrant, a receipt substantially as follows:

Asylum for the insane at ———,
———, A. D. —.

Received this day of ———, the patient named in the within warrant.
———,
superintendent.

This warrant, with the receipt of the superintendent thereon, shall be returned to the probate judge who issued it, and shall be filed by him with the other papers relating to the case. If the medical witness does not state in his certificate that the patient is free from all infectious diseases and from vermin, the probate judge shall refuse to make the application to the superintendent, as herein provided until such certificate is furnished. The relatives of any person charged with insanity, or who is found to be insane, shall, in all cases, have the right to take charge of and keep such insane person charged with insanity, if they desire so to do; and in such case, the pro-

bate judge, before whom the inquest has been held shall deliver such insane person to them. [85 v. 21.]

§ 706. Probate judge shall see that the patient has proper clothing. What clothing sufficient; superintendent not bound to receive patient without. When a patient is sent to the asylum for the insane, the probate judge shall see that he is supplied with proper clothing and, if not otherwise furnished, he shall furnish such clothing, and in such case, the same shall be paid for upon his certificate and the order of the county auditor out of the county treasury. For a male patient, the clothing shall be, a coat, vest, and two pairs of pantaloons, all of woollen cloth two pairs of woollen socks, two pocket handkerchiefs, two cravats, one hat or cap, a pair of shoes or boots, a pair of slippers, three cotton shirts, two pairs of drawers, two undershirts, and an overcoat or other outside garment sufficient to protect him in severe weather. For a female patient, such clothing shall be, two substantial gowns or dresses, two flannel petticoats, two pairs of woollen stockings, one pair of shoes, one pair of slippers, two handkerchiefs, a good bonnet, two cotton chemises, and a large shawl or cloak. In both cases the clothing shall be new, or as good as new, and the woollens of a dark color; and such clothing shall be delivered in good order, with the patient, to the superintendent, and, without such clothing, the superintendent shall not be bound to receive the patient. [75 v. 64, § 23.]

37 O. S. 546.

§ 707. Proceedings when insane person can not be admitted to asylum. If a person found to be insane can not be admitted into the asylum, the probate judge shall direct the sheriff of the county, or some other suitable person, to take charge of such insane person until the cause of non-admission is removed, and, if necessary he may direct the confinement of such insane person in the county infirmary or jail (but not in the same room with a person charged with or convicted of a crime), as the circumstances require; and if all things needful are not otherwise supplied, he shall furnish them, and in that case they shall be paid for

out of the county treasury, on the certificate of the probate judge; but he shall not, in any case, furnish anything, either in the way of clothing or for any other purpose, to a person who is not in needy circumstances; if there is no physician regularly employed to attend the jail or infirmary, the probate judge, may employ one to attend any idiot or lunatic therein and the physician so employed shall receive a compensation not exceeding two dollars per day, to be paid out of the county treasury on the certificate of the probate judge. [75 v. 64, § 24; 53 v. 81 § 64.]

§ 708. When insane person at large is dangerous he may be confined. When an insane person, not entitled to admission into an asylum, is at large, and, being so at large, is dangerous to himself or others, and such fact is established to the satisfaction of the probate judge, he shall immediately order such lunatic to be confined and provided for, as directed by the next preceding section; and when a person is so confined, and the attending physician certifies that such person is restored to reason, or that it is not necessary longer to confine him, or if his friends agree to take the care of him, the probate judge shall immediately order his discharge. [75 v. 64, § 25.]

§ 709. How a patient may be discharged. On consent and advice of the trustees, the superintendent may discharge any patient from any asylum for the insane, when he deems such discharge proper and necessary; provided, no patient with known homicidal or suicidal propensities, shall be discharged without a bond in the sum of one thousand dollars, with two or more sureties, to the approval of the probate judge of the county of which the patient is an inhabitant, payable to any person who shall be injured in person or property, by any insane act of such discharged person while at large on such discharge, and conditioned to save harmless by paying all damage to such injured person as shall arise in consequence of such insane act, committed by such discharged person. Incurable and harmless patients only may be discharged to make room for an acute case from the same county; and no patient, with

known homicidal or suicidal propensities, shall be hereafter kept in any county infirmary or jail of the state except temporarily, while awaiting the order for removal to a state asylum for the insane; when, in the opinion of the superintendent, the condition of any patient at the time of discharge, is such as to justify such action, he may permit such patient to go to his home, or leave the institution unattended; and if such patient is not financially able to bear his own expenses, the superintendent of such institution, may furnish the patient a sufficient sum to pay his traveling expenses, and charge the same to the current expense fund of the institution; such sum in no case shall exceed twenty dollars. In all cases requiring an escort, should neither the patient nor the friends of the patient be financially able to bear the expense of his removal, the superintendent shall give notice to the probate judge of the county of which the patient is an inhabitant, and said probate judge shall forthwith issue his warrant to some suitable person, giving the friends of patients the preference, which warrant shall read as follows:

The State of Ohio, _____ County, ss.:

Office of the probate judge of said county.

The proper authority having directed that _____, a patient from this county in the asylum for the insane, at _____, be removed therefrom, you are commanded forthwith to remove said patient, and return him to his home in said state.

Witness my hand and official seal, this _____ day of _____, 18—

A. B., probate judge.

Upon receipt of said warrant, the person to whom it is directed, shall forthwith execute it, and return it to the probate judge by whom it was issued, and said probate judge shall ascertain and fix the allowance to the person executing such warrant for expenses and fees, and certify the same to the county auditor, who shall draw his warrant therefor on the county treasurer. In the case of any patient having no known homicidal or suicidal propensities, the superintendent is authorized, whenever he deems the best interests of such patient to require it, to permit said patient to leave the institution on a trial visit, not in any case to exceed ninety days, the patient being returnable at any time within that

date, should such return be necessary, without further legal proceedings. The removal of such patient on such trial visit, shall be made in the same manner as provided in this section for the removal on discharge, and when return from such visit is necessary, and neither the patient nor the friends of the patient are financially able to bear the expense, said return shall be made on the warrant of the probate judge, in the same manner as provided herein in the case of discharged patients in like circumstances. [85 v. 123.]

The power of the officers of the asylum to discharge is plenary and when made the duty of the probate judge to issue the warrant is entirely ministerial, and if he refuses he may be compelled by mandamus to issue the warrant, 7 O. S. 153; but these sections apply only to patients having a settlement in the county and do not require the return of non-residents sent from the county to the penitentiary and thence transferred to the asylum, 17 O. S. 148. Mandamus does not lie to compel superintendent to take back inmate, 38 O. S. 496.

§ 710. Superintendent to report death, escape, etc., to probate judge. The superintendent shall, immediately after the removal, death, escape, or discharge of any patient or return of an escaped patient report the same to the probate judge of the county from which such patient was committed, and in case of death he shall notify one or more of the nearest relatives of such deceased patient, if known to him, either by letter or telegraph, as to him may seem best and if the place of residence of such relatives is unknown to the superintendent, the probate judge, immediately upon receiving notification, shall in the speediest manner possible, notify such relations if known to him, and when a patient is discharged as cured, the superintendent may furnish such patient with suitable clothing, and a sufficient sum of money to pay the actual traveling expenses of such patient to the township in the county from which he or she was sent, not in any case exceeding twenty dollars. [78 v. 102.]

§ 711. How patients selected in certain cases. If application is made to an asylum for the insane for the admission of more patients than such institution can accommodate, a selection shall be made as follows:

1. Recent cases, that is, where the disease is of less than one year's duration, shall have the preference over all others in the same county. 2. Chronic cases, that is, when the disease is of more than one year's duration, presenting the most favorable prospect of recovery, shall be next preferred. 3. Those for whom applications [have been] longest on file, other things being equal, shall next be preferred: 4. No county can have in any institution more than its just proportion according to its population, except in cases where some other county in the same asylum district has not a sufficient number of patients to fill up its proportion: in such cases, the superintendent may admit from a county more than its just proportion, giving preference to patients applying as herein provided. [75 v. 64, § 28.]

§ 712. **Proceedings when patient, discharged as cured, again becomes insane.** When a patient discharged from an asylum for the insane as cured, again becomes insane, and a respectable physician files with the probate judge of the county of which the insane person is an inhabitant, an affidavit setting forth the fact of the recurrence of the disease, and such other facts relating thereto as he deems proper, the probate judge shall forthwith transmit a copy of such affidavit, authenticated by his official seal, to the superintendent of the proper asylum, and thereupon the same proceeding shall be had as provided in this chapter for persons found to be insane upon inquest held for that purpose. [75 v. 64, § 29.]

§ 713. **Patients entitled to benefit of habeas corpus.** All persons confined as insane shall be entitled to the benefit of the writ of *habeas corpus*, and the question of insanity shall be decided at the hearing; and if the judge decides that the person is insane, such decision is no bar to the issuing of the writ a second time, when it is alleged that such person has been restored to reason. [75 v. 64, § 30.]

§ 714. **Probate judge to file and preserve papers.** In all cases of inquests held under the provisions of this chapter, the probate judge shall file and preserve all papers left with him, and shall make such entries

upon his docket as will, together with the papers so filed, preserve a perfect record of each case tried by him. [75 v. 64, § 31.]

§ 718. Prosecuting attorneys shall attend to suits. Prosecuting attorneys shall attend to all suits instituted on behalf of the asylums for the insane, and shall be entitled to a compensation of five per cent. on all sums collected for the same. [75 v. 64, § 35.]

§ 719. Costs in cases of inquest. The taxable costs and expenses to be paid under the provisions of this chapter shall be as follows: To the probate judge with whom the affidavit is filed, the sum of two dollars for holding an inquest; for each warrant, certificate, or subpœna, he necessarily issues, the same fees as are allowed by law to the clerk of the court of common pleas for similar services; and the amount of postage on all communications to and from the superintendent which the judge is required to pay; to the medical witness who makes out the certificate, two dollars, and witness fees, such as are allowed by law in other cases; to the witnesses and constables, the same fees as are allowed by law for like services in other cases; to each person employed by the probate judge to commit a lunatic to the county infirmary, seventy-five cents per day; to the jailer, for keeping an idiot or insane person, thirty-five cents per day; to the sheriff or other person than an assistant, for taking an insane person to the asylum, or removing one therefrom upon the warrant of the probate judge, mileage at the rate of ten cents per mile, going and returning, and seventy-five cents per day for the support of each patient, on his journey to or from the asylum, and to each assistant five cents per mile, and nothing more; the number of miles to be computed in all cases by the nearest route traveled; the costs specified in this section shall be paid out of the county treasury, upon the certificate of the probate judge. [83 v. 36; 75 v. 64, § 36.]

§ 720. Definitions of terms. The terms "insane" and "lunatic," as used in this chapter, include every species of insanity or mental derangement; the term

"idiot" is restricted to a person foolish from birth, one supposed to be naturally without a mind; a person with a family is one who has a wife and child or either; the words "needy circumstances," when applied to a person without a family, means one whose estate, after the payment of his debts, and excluding from the estimate such part of his estate as is exempt from execution, is worth less in cash than five hundred dollars; and the same words, when applied to a person having a family, means one whose estate, estimated as aforesaid, is worth less in cash, after the payment of his debts and the support of his family for one year, than one thousand dollars, provided, that when the words are applied to a married woman, her estate, and that of her husband, shall be estimated, as aforesaid, and the amount shall determine the question whether she be in needy circumstances or not, within the meaning of this chapter. [75 v. 64, § 37.]

§ 721. **Removal or discharge from infirmary.** When the probate judge issues his warrant for the removal to an asylum for the insane of any insane person, temporarily committed to a county infirmary, the certificate of the superintendent of such infirmary, or the physician in charge thereof, that the condition of such insane person, by recovery or otherwise, has so changed as to make it unsuitable to remove him to the asylum, shall be a sufficient return to the warrant; and the superintendent of the infirmary is authorized, in case such person has recovered, to discharge him therefrom. [75 v. 64, § 38.]

§ 738. **Proceedings to obtain admission to Longview Asylum, Hamilton county.** For the admission of inmates into this asylum, the following proceedings shall be had: Some resident citizen of Hamilton county must file with the probate judge thereof an affidavit, substantially as follows:

The State of Ohio, Hamilton county, ss.:

The undersigned, a citizen of Hamilton county, Ohio, being sworn, says that he believes _____ to be insane, and a fit subject for the lunatic asylum; he is a resident of Hamilton county, has a legal settlement in _____ township. These facts are known by _____ and _____ (naming at least two persons). [75 v. 93, § 20].

§ 739. Id. Warrant, subpoenas, etc. When this affidavit is filed, the probate judge shall forthwith issue his warrant to the sheriff, or some other suitable person, commanding him to bring the person alleged to be insane before him, on a day in such warrant named, which shall not be more than five days after the affidavit was filed, and shall immediately issue subpoenas to such witnesses as are named in the affidavit and a physician to be designated by the probate judge, commanding them to appear before him, on the return day of the warrant; and if any person disputes the insanity of the person so charged, the judge shall issue subpoenas for such persons as are demanded on his behalf. [75 v. 93, § 21.]

see § 703.

§ 740. Id. Examination, etc. At the time appointed, (unless for good cause the investigation is adjourned), the judge shall proceed to examine the witnesses in attendance, and if, upon the hearing of the testimony such judge is satisfied that the person so charged is insane, and is included in the class enumerated in this chapter, he shall cause a certificate to be made out by the physician, setting forth the name, age, and residence of the patient, with a concise history of the case, medical treatment pursued, supposed cause of the disease, and such other information as is deemed useful. [75 v. 93, § 22].

See § 704.

§ 741. Id. Patient shall be taken to asylum. How. The probate judge, upon receiving the certificate aforesaid, shall forthwith transmit a copy thereof, and his finding in the case, under his official seal, to some suitable person (giving the relatives of such insane person the preference), who shall immediately take charge of and convey such patient to the asylum, and return therefor, to the probate judge, a receipt of the superintendent, to be filed with the other papers in the case. [75 v. 93, § 23].

See § 705.

§ 743. Id. Probate judge to file and preserve papers. In each case of inquest held under the provisions of this chapter, the probate judge shall file and carefully

preserve all papers relating thereto, and shall make such entries as will, together with the papers filed, preserve a complete record thereof. [75 v. 93, § 26].

§ 746. *Id.* Prosecuting attorney shall attend to suits. The prosecuting attorney of Hamilton county shall attend to all suits instituted on behalf of the asylum, and shall be entitled to five per cent. on all sums collected by him, as compensation therefor. [75 v. 93, § 29].

§ 748. *Id.* Costs and expenses. The taxable costs and expenses to be paid under the provisions of this chapter shall be as follows: To the probate judge, for filing affidavit and holding inquest, the sum of two dollars; to the person making affidavit as required for an inquest, two dollars, and witness fees as are allowed in other cases; to witnesses, constables, and sheriffs, the same fees as are allowed for like services in other cases. [75 v. 93, § 31].

§ 749. *Id.* Penalties. If the probate judge, or any other person charged with duties under this chapter, neglects or refuses to discharge any such duties, he shall forfeit a sum not exceeding fifty dollars, to be recovered for the use and benefit of the asylum in a civil action, conducted in the name of the county of Hamilton, as in case of a debt due the asylum, or may be removed from his office in the same manner as for any other neglect of duty. [75 v. 93, § 32].

BOYS' INDUSTRIAL SCHOOL.

§ 752. Committal and discharge of youths. The boys' industrial school situate in Fairfield county, has for its object the reformation of those committed to its charge: and all youth committed thereto, shall be committed until they arrive at full age, unless sooner reformed; provided, that the judge of the court sentencing such youth may order their discharge whenever he is satisfied by a re-examination of the facts connected with the arrest, conviction and detention of the person confined, due notice of the time and place of such re-hearing having first been given by the

court to the superintendent of the boys' industrial school, that the future welfare of such youth and the interest of society will not be endangered thereby. [83 v. 6.]

§ 753. **Admission of youths to schools.** Male youth, not over sixteen nor under ten years of age may be committed to the boys' industrial school by any judge of a police court, judge of the common pleas court or probate court on conviction of any offense against the laws of the state. [83 v. 7.]

§ 754. **Admission of convicts to school.** Any such youth convicted of any crime or offense the punishment of which is, in whole or in part, confinement in the jail or penitentiary, may at the discretion of the court giving sentence, in lieu of being sent to the jail or penitentiary, be committed to the boys' industrial school. [83 v. 7.]

§ 755. **May be committed on recommendation of grand jury.** Any such youth against whom a crime is charged before a grand jury, if the charge is supported by sufficient evidence to put him on trial may, on the recommendation of the grand jury, and without presenting an indictment, be committed by the court to the reform school. [75 v. 60, § 110.]

§ 756. **Conveyance to school of sentenced youth and delivery to superintendent.** Any such youth upon being sentenced to the boys' industrial school, shall within five days after such sentence, unless the court giving such sentence shall otherwise order, be conveyed to said industrial school by the sheriff of the county in which the conviction was had, or by some other suitable person designated by the court giving the sentence and delivered into the custody of the superintendent of the boys' industrial school together with a statement of the offense for which such youth was convicted, also his age, and a copy of the sentence of the court. [83 v. 201.]

§ 759. **Transportation expenses, costs of commitment.** The expenses incurred in the transportation of a youth to the boys' industrial school shall be paid by the county from which he is committed, to the offi-

cer or person delivering him upon the presentation of his sworn statement of account of such expenses; and the costs in any case, shall be paid in like manner, upon the certificate of the proper officer of the court in which he was convicted; if, however, such youth has been convicted of a crime, the punishment of which is confinement in the penitentiary, the costs in the case, and the expenses of his transportation shall, on like statement and certificate, be paid out of the state treasury. [83 v. 201.]

COMMITMENT TO GIRLS' INDUSTRIAL HOME.

§ 763. **How girls charged with offenses brought before court. Time for hearing offense.** Whenever a resident citizen shall file with the probate judge of his county his affidavit, charging that a girl above the age of nine years and under the age of fifteen years who resides in such county, has committed an offense, punishable by fine or imprisonment, other than imprisonment for life, or that she is leading a vicious or criminal life, it shall be the duty of such judge to fix a time not more than five days from the time such affidavit is filed for hearing the complaint set forth in such affidavit, and he shall forthwith issue a warrant to the sheriff of such county, or some other suitable person, commanding him to bring such girl before such judge at his office, at the time fixed for such hearing, and shall also, at the same time, issue an order in writing addressed to the father of such girl, if living and resident of such county, and if not living and so resident, then to her mother, if living and so resident, and, if there is no father or mother so resident, then to her guardian, if so resident, and if not, then to the person with whom the girl resides, requiring such father, mother, guardian, or other person, to appear before such probate judge at such hearing, and said judge is authorized to continue such proceeding from day to day, and issue all necessary subpoenas for witnesses. [84 v. 77].

See § 774.

§ 770. **Proceedings. Commitment to the home.** At the time named in the aforesaid order, the probate judge shall hear such testimony as is presented before him in relation to the case, and if it appears to his satisfaction that the girl before him is a suitable subject for the industrial home, he shall commit her to that institution, and issue his warrant to the sheriff of the proper county, or to some suitable person to be appointed by him, commanding him to take charge of the girl and deliver her without delay to the superintendent of the home. [75 v. 144, § 9].

§ 771. **Fees.** The girl may demand a trial by jury. The fees of the probate judge, sheriff, and other costs incurred in the proceedings herein provided for, shall be the same as are paid in similar cases, and shall be paid by the proper county in the same manner; but nothing in this chapter shall be construed to prevent a girl arrested for crime from demanding a trial by jury, and when such demand is made, by or on behalf of such girl, the probate judge is authorized, after an examination of the case, to either discharge her or cause her to enter into a recognizance for her appearance before the court of common pleas of the county, forthwith, if said court is in session, and if not in session, then on the first day of the next term thereof, to answer to such charge, and in default of such bail, to commit her to the jail of the county until the first day of said next term of common pleas court, or until discharged by due course of law, and he shall forward to the clerk of the common pleas court a transcript of his proceedings in the case; and shall also cause such witnesses as appear against her before him, to be recognized to appear at said term of common pleas court to give evidence against her. [75 v. 144, § 9].

§ 773. **Detention and discharge of inmates of girls' industrial home.** A girl duly committed to the home shall be kept there, disciplined, instructed, employed, and governed, under the direction of the trustees, until she is either reformed and discharged, or bound out by them, according to their by-laws, or has attained the age of eighteen years; but the

trustees with the approval of the governor after a full statement of the cause shall have the right to discharge and return to the parents, guardian, or probate judge of the county from which she was committed, who may place under the care of the infirmary directors of said county any girl, who, in their judgment, ought, for any cause, to be removed from the home, and in such case the trustees shall enter upon their records the reasons for her discharge, a copy of which record, signed by their secretary, shall be forthwith transmitted to the probate judge of the county from which the girl was committed [79 v. 84, 75 v. 144, § 10].

§ 774. **Proceedings when a girl is charged with a criminal offense.** When a girl between nine and fifteen years of age is brought before a court of criminal jurisdiction charged with an offense, punishable by fine or imprisonment, other than imprisonment for life, and who, if found guilty, would be a proper subject for commitment to the home (an order to that effect being entered on the records of the proceedings of said court), it shall, thereupon, by warrant or order, cause such a girl to be forthwith taken before the probate judge of the proper county, and shall transmit to him the complaint and indictment, or warrant, by virtue of which she had been arrested, when the probate judge shall proceed in the same manner as if she had been brought before him upon the original complaint, as is provided in this chapter. [75 v. 144, § 11].

See § 769.

PROCEEDINGS ON COMPLAINT AGAINST COUNTY AUDITOR.

§ 1031. **For what causes auditor shall forfeit his office.** If an auditor refuses or neglects to make any settlement with his county treasurer, according to law, or wilfully fails to perform any other duty required of him by law, he shall, in addition to criminal prosecution therefor, forfeit his office; and upon an affidavit being made before the probate judge of the county that the auditor of his said county is guilty of a vio-

lation of the provisions of this chapter, or of any duty enjoined herein, the probate judge shall immediately issue a summons to the auditor, which summons shall be made returnable as in other civil suits; and if upon examination, the court is satisfied that there are reasonable grounds for such complaint, the court may report the same to the county commissioners, who shall immediately suspend said auditor, and appoint some suitable person to perform the duties of auditor, until such auditor is restored to the possession of his office, or his successor duly elected and qualified, who, upon giving bond and taking the oath of office, as county auditors are required to do, shall be authorized to perform all the duties and be subject to all the obligations and liabilities of county auditors, and his bond shall be filed and recorded the same as bonds of county auditors. [67 v. 103, § 20.]

APPOINTMENT OF EXAMINERS OF COUNTY TREASURY BY
PROBATE COURT.

§ 1129. **Examinations of county treasurer. Appointment of examiners by probate judge. Their duties.** An inspection and thorough examination of all books, vouchers, accounts, moneys, bonds, securities, and other property in the treasury of the county, shall be made by the auditor and commissioners thereof as often as every six months in each year, and the probate judge shall once every six months or oftener, if he deems it necessary, or whenever he is requested so to do in writing, by one or more of the bondsmen of the treasurer; and on the day and at the time the treasurer turns over his office and its effects to his successor in office, without notice to any one, he shall appoint in writing, under the seal of said court, two competent and trustworthy accountants of opposite politics, neither of whom shall have held the office of treasurer, nor been a clerk in any county office during the two years next preceding such appointment; provided, that persons who have served as examiners under the provisions of this section shall not

again be appointed, until the expiration of three years, who, after being sworn to faithfully perform the duties imposed upon them, shall forthwith, without previous notice or intimation to the county treasurer, or any other person, of such intended inspection and examination, enter the county treasury, present their authority aforesaid to the county treasurer, demand the keys of the vaults and safes, and proceed immediately to count the money therein, and inspect and examine the books, records and vouchers thereof; and after having counted the money, inspected and examined the books, records and vouchers found therein, make due entry of the same; after which the said examiners shall proceed forthwith to the office of the county auditor, and there ascertain how much money the county treasurer stands charged with on the auditor's books. Said auditor shall furnish such accountants with a statement of the exact amount of money, property, bonds, securities, assets, and effects, also, how much belongs to each particular fund, and should be in the said treasury; the said accountants shall certify the exact amount of money in the treasury, together with the amount belonging to each particular fund, also, all property, bonds, securities, vouchers, assets, and effects, as aforesaid, in writing, in triplicate, one copy of which certificate shall be recorded in the books of the treasury, and filed by the treasurer in his office, and one copy shall be recorded and filed by the auditor of the county; one copy thereof shall be duly reported to the probate court, and be entered of record therein, a copy of which shall be furnished by the probate judge for publication, one week in two newspapers of opposite politics of general circulation in the county in which such examination is made; and the said accountants so appointed and performing the duties therein required, shall be paid five dollars per day, for the time necessary to the performance of the same; out of the county treasury, on a warrant drawn by the county auditor and approved by the certificate of said court, particularly specifying the duty performed; and the auditor of state is authorized, when, from infor-

mation filed in his office, he deems it necessary for the safety and security of the public funds, to appoint a competent accountant, who shall, in like manner, proceed to examine the county treasury and count the funds therein, and have the same powers and receive the same compensation, to be paid in the same manner, as examiners appointed by a probate judge and in addition thereto his necessary expenses incurred, to be approved by the auditor of state, and such examiner shall, immediately after ascertaining the condition of the county treasury, and the amount of money therein, certify the same, in the manner aforesaid, and file one copy of the certificate with the county auditor, and one with the county treasurer, and transmit one copy to the auditor of state, to be filed in his office, and the county treasurer and county auditor shall submit the offices, books, safes, moneys, papers, and effects thereto belonging, to the inspection of such examiner, or examiners, on demand; provided, that in counties in which the county treasurer is also city treasurer by virtue of law, the examination herein provided for shall embrace the funds belonging to the city, and the city clerk or city auditor shall perform the same duties herein required of the county auditor. Any officer or person violating any of the provisions of this section, shall be fined in any sum not exceeding one thousand nor less than one hundred dollars, or be imprisoned in the penitentiary not more than five years, or both, at the discretion of the court. [82 v. 173.]

DISPOSITION OF PROPERTY FOUND ON DEAD PERSON.

§ 1224. Coroner shall return description of person found dead. When an inquest is held, the coroner shall, as part of his finding, give a description of the person over whose body the inquest is held, which description shall specify the name, age, sex, residence, place of nativity, color of the eyes, hair, marks,

and all other particulars which may assist in the identification of the person; and the coroner shall also make an inventory of all articles of property found on or about the person, and describe the same as minutely as can conveniently be done; also, of all moneys, specifying the amount, and kind, and denomination thereof. [53 v. 48, § 1.]

§ 1226. **Separate return of inventory and finding.** The inventory and the return, provided for in § 1224, shall be made separately from the finding as to the death, and shall, together with all the articles and moneys described in said inventory, be returned by the coroner or other officer, to the probate court. [53 v. 48, § 3.]

§ 1227. **Disposition of property found on deceased person. Duty of probate court.** In case the name of the person over whose body the inquest has been held, is unknown, the probate court shall make such order for the preservation of the property found on the person, other than money, as may be necessary for the future identification of said person; if the same is known, it shall make such other order as may to it seem best; the money found shall be applied, first, to pay the expenses of saving the body of the deceased, of the inquest and burial, and the remainder, if any, shall be paid into the county treasury and become a part of the general fund; but when property, other than money, is found upon the person over whose body such inquest was held, and such property is not identified or claimed within the period of one year, from the time the probate court received the same, it shall proceed to sell, at public sale, such property, after giving public notice for the period of ten days, in some newspaper of general circulation in the county, and pay the proceeds of said sale into the county treasury, to become a part of the general fund of said county: if, at any time thereafter, proof is made to the satisfaction of the probate court or the county commissioners, of the right of any person or persons, by inheritance or otherwise, to said funds, or any part of the same, said court or commissioners shall certify the same to the county auditor, who

shall thereupon draw a warrant on the treasurer of the county, in favor of such claimant or claimants, for the sum so paid into the treasury and all probate judges shall collect and pay into the treasury of their respective counties to be paid over, as herein provided, all moneys of which they are trustees, under the provisions of the former laws on this subject, and the prosecuting attorney of each county is required to prosecute all suits, in the name of the state, that are necessary to enforce the provisions of this section. [73 v. 247, § 4.]

§ 1228. **Right of administrator or executor.** The provisions of this chapter shall not interfere with the rights of any administrator or executor, appointed and qualified in due course of law, but such moneys and effects shall be delivered up to said administrator or executor, whether before or after return thereof to the court of probate. [53 v. 48, § 5.]

MISCELLANEOUS PROVISIONS.

§ 1234. **Sheriff's fees in probate court.** The sheriff, for performing the duties required by law, in the court of probate, shall receive the same fees as are allowed by law for similar services in the court of common pleas, to be taxed against the proper parties, by the probate judge. [73 v. 127, § 16; 76 v. 117, § 24.]

Sec § 1230 *et seq.*

§ 1269. **Probate judge may approve of bond of prosecuting attorney.** Before entering upon the discharge of his duties, the prosecuting attorney shall give bond to the state, with sureties to be approved by the court of common pleas or the probate court, in the sum of not less than one thousand dollars, to be fixed by either of said courts, conditioned that he will faithfully discharge all the duties enjoined upon him by law, and pay over, according to law, all moneys by him received in his official capacity; which bond, with the approval of one of said courts of the amount thereof and sureties thereon, and his oath of office indorsed thereon, shall be deposited with the county treasurer. [50 v. 215, § 3.]

§ 1334. Probate judge must report fees to county auditor. When. Each county treasurer, recorder, sheriff, prosecuting attorney, probate judge, commissioner, and clerk of the court of common pleas of this state, shall make returns, under oath, to the county auditor of their respective counties, on the first Monday of September of each year, of the amount of fees and moneys received by them, or due them during the year next preceding the time of making such return. [70 v. 51, § 1.]

PROCEEDINGS AGAINST OFFICERS OF MUNICIPAL CORPORATION.

§ 1732. Complaint by whom and how made. What to contain. Citation how issued and served. On complaint, under oath, filed with the probate judge of the county in which the corporation, or the larger part thereof, is situated, by any elector of the corporation, signed and approved by four other electors thereof, charging that any member of the council or alderman has received, directly or indirectly, any compensation for his services as councilman, alderman, committeeman, or otherwise, contrary to the provisions of § 1683. (1) or that any alderman, member of the council, or any officer of the corporation, is or has been interested, directly or indirectly, in the profits of any contract, job, work, or services, or is or has been acting as commissioner, architect, superintendent, or engineer in any work undertaken or prosecuted by the corporation contrary to the provisions of § 6076, (2) or that any alderman, member of council, or any officer of the corporation has been guilty of misfeasance or malfeasance in office, such probate judge shall forthwith issue a citation to such party, charged in the complaint, for his appearance before him within ten days from the filing of such complaint, and also furnish the accused and city solicitor with a copy thereof; provided, that the probate judge shall require the party complaining to furnish sufficient security for costs before acting upon such complaint. [68 v. 113, § 1.]

1. No member of the council or board of aldermen shall receive any compensation for his services, either as councilman, alderman, committeeman, or otherwise, except when acting as judge of election, when he shall receive such compensation as is provided by law for a judge of election, § 1683.

2. An officer or member of the council of any municipal corporation who is interested, directly or indirectly, in the profits of any contract, job, work, or services for the corporation, or acts as commissioner, architect, superintendent, or engineer, in any work undertaken or prosecuted by the corporation during the term for which he was elected or appointed, or for one year thereafter, shall be fined not more than one thousand nor less than five hundred dollars, or imprisoned not more than six months nor less than thirty days, or both, and shall forfeit his office. § 6976.

§ 1733. **Proceedings thereon.** On the day fixed by such judge for the return of the citation, it shall be the duty of the solicitor to appear on behalf of the complainant to conduct the prosecution, and the accused may also appear by counsel, and a time shall be set for hearing the case, which time shall not be more than ten days after such return; and if a jury is demanded by either party, the probate judge shall direct the summoning of twelve men, in the manner provided in the seventh division of this title; provided, that in villages and cities in which there is no office of solicitor, or where the solicitor is accused of any misfeasance or malfeasance in his office, it is hereby made the duty of the prosecuting attorney of the county to appear on behalf of such complainant to conduct the prosecution. [68 v. 113, § 2.]

(1.) § 2239.

§ 1734. **Challenge of jurors.** On the day fixed for the trial, if a jury is impaneled, either party may, in addition to the peremptory challenges allowed by law in other cases, object, for good cause, to any jurymen summoned; and any vacancies occurring for any cause, may be filled by the probate judge from the bystanders, until the panel is full, unless the party charged, or his counsel, demand a special venire to fill such vacancy. [68 v. 113, § 3.]

§ 1735. **The trial.** On the day designated for the trial, it shall take place, unless continued, on affidavit for good cause, to another fixed time, not exceeding ten days; and on the trial it shall be the duty of the solicitor to appear for the prosecution, examine witnesses designated by the complainant, and such

others as he may discover, and either party may have process from the probate judge to compel the attendance of witnesses. [68 v. 114, § 4]

§ 1736. **Removal of officer, if found guilty. Costs.** If the charges in the complaint are sustained on the trial by the verdict of the jury, or the decision of the probate judge when there is no jury, such judge shall enter the charges and findings thereon upon the record of the court, and make an order removing such officer from office, and forthwith transmit a certified copy of the same to the presiding officer of the council, whereupon the vacancy shall be filled as provided by law; and the cost and expenses of the trial shall be charged upon the party filing the complaint, the accused, or the municipal corporation, or apportioned among them, as the judge may see fit to direct, and shall be collected as in other cases; provided, no costs or expenses shall be charged to the accused, if upon such trial he is acquitted; and provided further, that if proceedings in error are instituted by the officer complained of, to reverse or vacate the order of the probate court, such officer shall not exercise the functions of his office until such order is finally reversed or vacated. [68 v. 114, § 5.]

APPROPRIATION BY CITIES AND VILLAGES OF PRIVATE PROPERTY FOR PUBLIC USE.

§ 2232. **Purposes for which private property may be appropriated.** Each city and village may appropriate, enter upon and hold, real estate within its corporate limits for the following purposes, but no more shall be taken or appropriated than is reasonably necessary for the purpose to which it is to be applied:

1. For opening, widening, straightening, and extending streets, alleys and avenues, also for obtaining gravel and other material for the improvement of the same, and for this purpose the right to appropriate shall not be limited to lands lying within the limits of the corporation.

2. For market space.

3. For buildings and structures required for the use of the fire department.

4. For public halls and necessary offices.
5. For prisons.
6. For infirmaries.
7. For workhouses.
8. For houses of refuge and correction.
9. For public hospitals.
10. For public parks, after the proposition to purchase and appropriate has been voted upon and endorsed by a majority of the voters in the village or city proposing to so appropriate land, after a notice of not less than thirty days, given in two newspapers of opposite politics if there be such published in said village or city, or in writing, in which the purchase price of said land, as agreed upon, shall be stated; and for this purpose the right to appropriate shall not be limited to lands lying within the limits of the corporation.
11. For gas-works.
12. For water-works; and for this purpose the right to appropriate shall not be limited to lands lying within the limits of the corporation.
13. For schoolhouse sites and grounds, and for this purpose the board of education shall select the site and recommend the appropriation; and for university sites and grounds, and for this purpose the board of directors of a university, whose property is exclusively owned, and whose directors are appointed by the municipal corporation, shall select the site and recommend the appropriation.
14. For public cemeteries; for which purpose the right to appropriate shall not be limited to lands lying within the corporation; but no land shall be appropriated under this provision until the court is satisfied that suitable premises can not be obtained by contract upon reasonable terms; and no lands shall be appropriated upon which there may be a dwelling-house, orchard, or nursery, or any valuable mineral or other medicinal spring, or well actually yielding gas, oil, or salt water; nor shall land be appropriated for such purpose within one hundred yards of any dwelling-house.
15. For public wharves and landings on navigable waters.

16. For levees to protect against floods; and for this purpose the corporation shall have power to appropriate, enter upon, and take, private property lying outside of the corporate limits, and may extend and strengthen its levees and embankments along a river or stream adjacent to the limits of the corporation, and may widen the channel of such river or stream.

17. For necessary bridges.

18. For constructing, opening, excavating, improving, deepening, enlarging, straightening, and extending any canal, ship canal, or water-course, located in whole or in part within the limits of the corporation, which is not owned in whole or in part by the state, or by a company or individual authorized by law to make such improvement.

19. For sewers, drains, and ditches; and for this purpose the corporation shall have power to appropriate, enter upon, and take private property lying outside of the corporate limits; but no lands not subdivided in lots or parcels of more than ten (10) acres, or tenements annexed or appropriated, shall be taxed at a higher rate than that in the township from which said lands and tenements were taken, so long as said lands and tenements were used for agricultural purposes only.

20. For public urinals, water-closets, and privies.

21. For lighting for any public use. [85 v. 177].

See § 8414, notes. Public market, 28 Hun. 515; 34 N. J. L. 201; 49 Mich. 249.

Public park, 58 Mo. 175; 127 Mass. 408 (citing cases); 45 N. Y. 234, can not be devoted to other uses destructive of the purpose, 55 Wis. 328. The statute is not objectionable because it authorizes the acquisition of land outside of city limits, 34 Hun. 441.

Sites for school-houses, 33 Vt. 278; 102 Mass. 512; 68 Pa. St. 170; 48 Mo. 243; 7 R. I. 545.

Telegraph and telephone lines, 53 Ala. 211; 43 N. J. L. 381.

Supplying cities and towns with water, 27 Ala. 104; 62 Cal. 182; 67 *Id.* 659; 75 Me. 91; 14 Md. 441; 15 *Id.* 240; 100 Mass. 350; 2 Johns Ch. 162; 12 Nev. 251; 46 N. J. L. 495 s. c.; 47 N. J. L. 811.

Cemeteries, 20 Conn. 466; 43 *Id.* 234; 46 Vt. 218; driveway to cemetery, 103 Mass. 106, but not for private cemetery, 66 N. Y. 569; 23 Am. Rep. 86, but that different sums are required for right to bury in different localities does not constitute the use a private one so long as all persons have the same measure of right for the same amount of money, 53 Conn. 551.

Dwelling-house does not include orchard, 47 Me. 345. Field not an orchard though fruit trees in some part of it, 23 Wend. 660. Public landing, 60 Miss. 563; 1 Pa. St. 309; use for grain elevator inconsistent, 10 Mo. App. 401; 12 Bull 59; wharf, 19 O. S. 229.

City hall, 19 Bull 404.

§ 2233 Additional purposes for which appropriation may be made. The power to appropriate may also be exercised for the purpose of opening or extending streets or alleys across railway tracks, and lands held or owned by railway companies, where such appropriation will not necessarily interfere with the reasonable use of such road or land by the railway company; such power may also be exercised where it is necessary to acquire the right of way to, or additional ground for, the enlargement or improvement of the public works herein specified; and whenever material is required for the construction, improvement, or repair of any such works, the corporate authorities are empowered to appropriate and take the same, and for this purpose they may go outside the corporate limits. [70 v. 175, § 508.]

The power to extend streets over railroad tracks was conferred by the general authority to take land for street purposes, but the former use could not thereby be defeated, 23 O. S. 510.

§ 2234. Concurrence of two-thirds of council necessary for condemnation, etc. No improvement requiring proceedings for the condemnation of private property shall be made without the concurrence in the by-law, ordinance, or resolution directing the same, of two-thirds of the whole number of the members elected to the council. [66 v. 236, § 511.]

See 29 O. S. 69. Trustees of hamlet must all concur, § 1652.

§ 2235. Declaration of purpose to appropriate, etc. When it is deemed necessary by a municipal corporation to appropriate private property, as hereinbefore provided, the council shall, by resolution, declare such intent, defining therein the purpose of the appropriation, and setting forth a pertinent description of the property designed to be appropriated; and on the passage of such resolution, the yeas and nays shall be taken and entered on the record of the proceedings of the council. [66 v. 236, § 512.]

Municipal corporation passing an ordinance when it is deemed necessary to extend a street as provided by § 2642 need not also pass the resolution to the same effect as provided in this section, 4 Bull 273; 7 Rec. 734.

§ 2236. **Application to court, etc.** Upon the passage of the resolution by the requisite majority, application in writing shall be made to the court of common pleas of the proper county, or to a judge thereof in vacation, or to the probate court of the county, which application shall describe, as correctly as possible, the property to be taken, the object proposed, and the name of the owner of each lot or parcel of the property. [66 v. 236, § 513.]

Form of application.—City [or village of—— v [All interested parties] defendants, Probate court——county, Ohio.

The plaintiff represents that it is an incorporated city [or village] of the——grade——class under the laws of Ohio, and that its council by an ordinance [or resolution] passed on the——day of——188—the yeas and nays being taken and entered on the proceedings of said council and two-thirds of all the members elected to said council concurring therein, did declare that it was deemed necessary to condemn and appropriate the property hereinafter described for public purposes [*here state the purpose of the appropriation*] as will appear from a duly certified copy of the ordinance [or resolution] hereto attached and made part hereof. That said property is described as follows: [*Here describe the whole tract.*] That the several parties made defendants herein own or claim to own or have some title or interest in said property as designated and shown on the plat filed herewith and made part hereof and divided into lots or parcels as follows, viz: Lot No. [*here describe each lot or parcel and give the names of the owners and persons having an interest therein.*] Wherefore plaintiff asks the court to cause a jury to be impaneled for an inquiry and assessment of compensation to be paid by said city [or village] for said property condemned as above set forth. And plaintiff asks that upon payment into court or to the proper owners, defendant herein of an amount of compensation equal to the sum so assessed as the value of the parcels of ground above described, the appropriation of such land may be allowed and possession awarded according to law, and that the court will divide the sum so paid or order its distribution among the several claimants in respect to their interests in the property. —————Solicitor of———

§ 2237. **Service of notice to owners of property, etc.** Notice of the time and place of such application shall be given personally in the ordinary manner of serving legal process, to all the owners or agents of the owners of the property sought to be appropriated, resident in the state, whose place of residence is

known; and to all others, by publishing the substance of the application, with a statement of the time and place at which it is to be made, for three weeks next preceding the time of the application, in some newspaper of general circulation in the county. [72 v. 25, § 514.]

Notice by publication.—Legal notice. A. B. who resides in _____ county _____ Indiana, and all other persons interested in the property hereafter described, are hereby notified that an application in writing substantially as herein set forth will be made by the city [or village] of _____ to the Hon. _____ judge of the probate court of _____ county, Ohio, on _____ day of _____ 188— at _____ o'clock—M. to impanel a jury to assess the compensation to be paid by said city [or village] to the owners of the following described real estate. [*Describe entire strip, and lots into which it is divided, giving the names of the owners*] said property having been condemned and appropriated to public use for the purpose [*state the purpose of the appropriation*] by a resolution [or ordinance] passed by the council of said city [or village] on _____ day of _____ 188— and plaintiff asks that upon payment into court or to the proper owners the defendants, of the amount of compensation equal to the sum so assessed as the value of the parcels of ground described in said application, the appropriation of said land may be allowed according to law and that the court will divide the sum so paid or order its distribution among the several claimants in respect to their interests in the property. _____ Solicitor for said city [or village.]

Mortgagee whose mortgage is recorded an "owner" within the meaning of the section and entitled to notice, 1 C. C. R. 49, and if the property is taken without notice to him he may sue the corporation and recover damages, *Id.* Service at residence within jurisdiction good, 2 Bull 142.

§ 2238. Court to fix time for assessment of compensation by jury. If it appear to the court or judge that such notice has been served five days before the time of the application, or has been published as provided in the preceding section, and that such notice is reasonably specific and certain, the court or judge may set a time for the inquiry into and assessment of compensation, by a jury of twelve men, unless all the parties agree upon a less number, who shall be duly sworn to discharge that duty. [66 v. 236, § 515.]

Entry.—[*Title.*]—This case coming on to be heard upon the application of the city [or village] of _____ to impanel a jury to assess the compensation to be paid to the owners of the property described in said application and the court finding that all the resident defendants have been duly served with notice of the pendency of the application in the ordinary manner of serving legal process at least five days prior to this application and that all non-resident defendants have been served

with notice by the publication of the substance of the application in the———a newspaper of general circulation in the county for three consecutive weeks from and after the——day of——188—and that all other proceedings are regular and valid, does hereby order and adjudge that a jury be impaneled on the——day of——188—at—o'clock—M. for the purpose of assessing the compensation to be paid for said property.

Order to summon jury.—State of Ohio——county, probate court. To——Esq. Sheriff of——county, greeting.

We command that you summon the following named persons, judicious men, having the qualifications of electors, to be and appear before the Honorable——judge of the probate court, within and for said county, at the court house in——on the——day of——A. D. 18—at—o'clock—M. and so from day to day until discharged, then and there to serve as jurors in and for said county to-wit, [*here give list of jurors.*]

And have then and there this writ.

In witness whereof, I have hereunto set my hand and affixed the seal of said court at——this——day of——188—.

———probate judge.

§ 2239. Special term of common pleas may be had. If the application be in the court of common pleas, and such court is not in session on the day fixed for the inquiry and assessment of compensation, the judge of the court of common pleas of the subdivision in which the property is situated, or in case of his absence, interest, or disability, any other judge of the court within the district, shall hold a special term of court for the purpose of hearing and determining such inquiry and assessment, and shall direct a jury to be summoned for the purpose of making such inquiry, in the same manner that petit jurors are summoned in the court of common pleas for other purposes. [66 v. 237, § 516.]

§ 2240. How jurors drawn in probate court. If the application be in the probate court, the clerk of the court of common pleas of the county shall, on the day fixed for the application, in the presence of the probate judge, draw twelve names, or such less number as may be agreed upon by the parties, from the box containing the names of persons selected as jurors for the county; and the persons so drawn shall be summoned and serve as the jury, unless excused or set aside by the court for good cause shown; and if, for any cause, the panel is not full, the probate judge shall fill the same from the bystanders. [66 v. 237, § 517].

Property owners are only entitled to two peremptory challenges, 19 Bull 404.

§ 2241. **Inquiry to be at time fixed.** The inquiry and assessment shall be made at the time appointed, unless, for good cause, continued to another day. [66 v. 237, § 518].

§ 2242. **View of premises may be required.** A view of the premises shall be ordered when desired by the jury, or demanded by a party interested in the proceeding. [66 v. 237, § 519].

See 19 Bull 258.

§ 2243. **Guardian ad litem for infants, etc.** If, at the time of such application, it appear that any of the owners of the property sought to be appropriated are infants, or insane, and that they have no guardian, a guardian *ad litem* shall be appointed to act in their behalf. [66 v. 237, § 520.]

Proceedings to assess compensation for property of minor invalid unless guardian *ad litem* appointed though minor is actually represented in the case by an attorney employed by his actual guardian and the fact of minority is not known until after the trial, Ham. Dist. Ct. under act 1852, cited in Peck's Mun. Corp. 254.

§ 2244. **Maps, plats, etc., may be required of corporation.** The corporation may be required to file a more full and accurate description of the property to be taken, and the object proposed, and maps, plats, and surveys, if, in the opinion of the court, the same are necessary and proper. [66 v. 237, § 521.]

Not error to permit copy of plat from which computations of engineer made, to be given to jury. 32 O.S. 215.

§ 2245. **How jury to return assessment.** Open and close of case. **Assessment when building situated partly on adjoining land.** The assessment shall be in writing, signed by the jury, and shall be so made that the amount payable to each owner may be ascertained either by allotting it to each owner by name, or on each lot or parcel of land; the owners shall have the right to open and close the case in the introduction of evidence and the argument, but not more than two counsel shall be heard for the city or the owners of

any separate lot or tract, unless the court, for good cause, direct otherwise: and the inquiry and assessment shall, in other respects, be made by the jury, under such rules and regulations as shall be given by the court; and when a building or other structure is situated partly upon the land sought to be appropriated, and partly upon adjoining land, and such structure can not be divided upon the line between such two tracts of land without manifest injury, the jury, in assessing the compensation to any owner of the lands, shall assess the value of the same exclusive of the structure, and make a separate estimate of the value of the structure; the owner of the structure may elect to retain the ownership of the same, and to remove it, or to accept the value thereof as estimated by the jury; if he fail to make such election within ten days from the report of the jury, or within ten days from the termination of the cause in any higher court to which it may be taken, he shall be deemed to have elected to retain and remove the structure; but if he elect to accept the value of the structure, the title thereto shall vest in the city or village making the appropriation, which shall have the right to enter upon the land for the purpose of removing the structure therefrom. [66 v. 237, § 522; 76 v. 79, § 14.]

Verdict.—[*Title.*]—We, the jurors in this case, having inspected the premises of said _____ and having heard the testimony offered by the parties, the arguments of counsel and charge of the court, do award and determine that the said _____ be paid the sum of _____ dollars compensation for the land belonging to _____ which land is designated as parcel _____ in the application herein, which is appropriated by the city of _____ for the purpose of _____ without deduction for benefits to any land of said _____ derived, or to be derived, by the _____.

And we do, also find and determine that the residue of the premises of said _____ will be rendered less valuable by reason of said appropriation in the sum of _____ dollars, without deduction for benefits to any land of said _____ derived, or to be derived by the _____.

And we do also find and determine that the building partly situated upon the premises appropriated as aforesaid is worth the sum of _____ dollars, without deduction for any benefits to be derived from said appropriation. [*Signed.*]

Formerly it seems the municipal corporation was entitled to open and close, 32 O. S. 215, see § 6414 notes *compensation, evidence, etc.*, 16 Bull 258.

§ 2246. *Verdict in whole or in part.* The jury shall

be sworn to make the whole inquiry and assessment, but may be allowed to return a verdict as to part, and be discharged as to the rest, in the discretion of the court; and in case a jury is discharged from rendering a verdict in whole or in part, another shall be drawn and impanelled at the earliest convenient time, who shall make the whole inquiry and assessment, or the part not made, as the case may be. [66 v. 237, § 523.]

§ 2247. Orders as to payment or deposit of assessment. When the assessment has been made by the jury, the court shall make such order as to payment or deposit by the corporation as may seem proper; such order shall designate the time and place of payment or deposit, the persons entitled to receive payment, and the proportion payable to each; and the court may require adverse claimants for any part of the money or property, to interplead and fully determine their rights in the same proceeding. [66 v. 238, § 524.]

The property owners are not entitled to separate juries for each separate lot or parcel, and are not entitled to demand struck juries for each separate lot or parcel, 19 Bull 404; see § 6422.

§ 2248. Order as to time, etc., possession to be taken. The court may direct the time and manner in which possession of the property condemned shall be taken or delivered, and may, if necessary, enforce any order giving possession. [66 v. 238, § 525.]

Final decree.—[*Title.*]—This cause coming on to be heard upon the application of the city [or village] of——for the assessment or compensation to be paid to the owners of the lots described in the application and all interests therein appropriated by the said city [or village] for——purposes [*state the purpose of the appropriation*] and all parties having been duly and legally served with process and a jury having been impanelled to assess the compensation and having viewed the premises, heard the testimony of witnesses, the arguments of counsel and the charge of the court and having returned their verdict into court assessing the compensation to be paid for the several lots therein mentioned as follows: [*copy verdict.*] And the court having examined all the proceedings herein finds them all regular and according to law and does further find that said lots of land and the several interests therein belonged to the persons whose names are set opposite to them as follows. It is therefore ordered and adjudged that said verdict and the several assessments made therein be and

are hereby confirmed. It is further ordered that said corporation pay [or secure to be paid by a deposit of money under the direction of this court] within——days the amount of compensation so assessed for the use of the following named persons [*give names of owners and amount of compensation assessed to each.*] And it is further ordered that upon payment [or deposit] by said corporation of the several amounts allotted by the jury to the persons above mentioned as the owners of the several lots, or into court, that the city [or village] shall be entitled to all interests and estate in and to the possession of the lots above mentioned and that an order shall issue to the sheriff of——county to put the plaintiff in possession of said property and interests. It is further ordered that said corporation within——days from this date, pay the costs herein, taxed at——dollars.

§ 2249. **Costs, how paid.** The costs occasioned by the inquiry and assessment shall be paid by the corporation, and the other costs which may arise shall be charged or taxed as the court in its discretion may direct. [66 v. 238, § 536.]

§ 2250. **No delay from doubt of ownership.** No delay in making an assessment of compensation, or in taking possession, shall be occasioned by any doubt which may arise as to the ownership of the property, or any part thereof, or as to the interests of the respective owners; but in such cases the court shall require a deposit of the money allowed as compensation for the whole property or the part in dispute; and in all cases, as soon as the corporation shall have paid the compensation assessed, or secured its payment by a deposit of money under the order of court, possession of the property may be taken, and the public work or improvement progress. [66 v. 238, § 527.]

§ 2251. **Interested parties may give bond, etc.** Any person interested in the appropriation of private land for a street, alley, or public highway, may, before or after the passage of an ordinance for the opening of such street, alley, or public highway, or before or after application to the court, execute his bond, payable to the corporation, to the acceptance of the council, conditioned for the payment of all damages which may be assessed by the jury; and such bond shall be good in law, and if such bondsmen pay or deposit according to the order of the court, then such street, alley or highway shall be

opened; or the corporation may, at its discretion, make such payment or deposit, and collect by law the amount of such damages of such bondsmen, with or without costs, as the court may direct. [66 v. 238, § 528.]

§ 2252. **Review of proceedings by motion for new trial, and petition in error.** Whoever, being directly interested, feels aggrieved by the verdict or finding, or any decision or judgment of the probate court or court of common pleas in any such proceeding, shall have remedy by motion for new trial and petition in error, as in other cases. [66 v. 238, § 529.]

§ 2253. **When execution of order may be suspended.** When such petition is filed, the court of common pleas or probate court, as the case may be, may suspend the execution of any order which may have been made, on such terms as may be deemed proper, and may require a bond with security for the payment of any damages or costs which may be thereby occasioned; but in all cases where the municipal corporation pays or secures by a deposit of money the compensation assessed by the jury, and gives such security as may be deemed adequate to pay any further compensation and all damages and costs which may be thereafter adjudged, the right to take and hold the property condemned shall not be affected by any such review. [66 v. 239, § 530.]

§ 2254. **Appeal to court of common pleas.** Where the proceeding is had in the probate court, any party interested in the inquiry and assessment may take an appeal to the court of common pleas; and thereupon the same proceedings shall be had as if the application had been originally made in that court, except that the corporation shall not be required to give notice of its application, and the inquiry and assessment shall be limited to the case of the party taking the appeal; and the court shall make such order for the payment of the costs accruing upon the appeal as may seem equitable and just. [66 v. 239, § 531.]

§ 2255. **Notice of intention to appeal. Bond.** The party desirous of appealing, shall, within ten days

after the date of the final order determining the rights of such party, file with the probate judge notice of his intention to appeal; and shall further, within twenty days after the making of the order, give a written undertaking to the adverse party, with one or more sufficient sureties to be approved by the probate judge, conditioned that the party appealing shall abide by and perform the order, judgment, or decree of the appellate court, and pay all costs or moneys which may be awarded against such party by the appellate court. [66 v. 239, § 532.]

See form, § 6403.

§ 2256. **Appeal by guardian, executor, etc., and married woman.** When the appeal is taken by a person as guardian executor, or administrator, who has given bond as such in the state, no undertaking shall be required from such guardian, executor, or administrator; and when an appeal is taken by a married woman, her liability shall be the same as if she had been sole. [66 v. 239, § 533.]

§ 2257. **Probate court shall furnish transcript.** The probate judge shall, upon the giving of the undertaking as provided in § 2255, or upon the filing of notice of the intention to appeal where no undertaking is required, prepare an authenticated transcript of the docket or journal entries, and of the order or decision appealed from, which shall be forthwith filed with the clerk of the court of common pleas by the person appealing, and the appeal shall thereupon be considered perfected; and if the transcript is not filed within thirty days after the date of the undertaking, or of the filing of the notice of intention to appeal where no undertaking is required, the party shall be deemed to have waived an appeal. [66 v. 239, § 534.]

§ 2258. **Original papers may be used.** The original papers pertaining to the proceeding may be used upon the hearing or inquiry in the court of common pleas, and shall be transmitted by the probate judge for that purpose. [66 v. 240, § 535.]

§ 2259. **Corporation not to appeal; or prosecute error except on leave.** The municipal corporation shall have no right of appeal; nor shall it prosecute error,

except upon leave of the reviewing court or a judge thereof. [66 v. 240, § 536.]

§ 2260. Effect of failure to pay for or take possession of land within six months. When a municipal corporation makes an appropriation of land for any purpose specified in this chapter, and fails to pay for or take possession of the same within six months after the assessment of compensation shall have been made, as hereinbefore provided, the right of the corporation to make such appropriation on the terms of the assessment so made, shall cease and determine; and any lands so appropriated shall be relieved from all incumbrance on account of the proceeding in such case, or the resolution of the council making the appropriation; and the judgment or order of the court, directing such assessment to be paid, shall cease to be of any effect, except as to the cost adjudged against the corporation. [66 v. 240, § 537.]

Time begins to run not from the rendition of the verdict, but from the entry of the judgment or order directing such assessment to be paid, 26 O. S. 109. Second condemnation, allowed after six months' failure to pay and take possession, 42 O. S. 239, (reversing 10 Bull 97) not before 2 Bull 142.

Railroad company can not after such period plead that in former action, verdict and judgment for value of lands were too high, 9 Bull 97, but where the corporation after such period took possession and caused the improvement to be made under the first appropriation, the owner, it was held, could elect to sue for the amount awarded him in that proceeding, or to have his damages assessed at the time the improvement was completed, 2 C. C. R. 199, and that having brought suit for the amount of such damages, he was entitled to interest only from the time the improvement was completed. *Id.*

§ 2261. Provisions of this chapter applicable to hamlets. In cases in which hamlets are authorized to appropriate private property, the proceedings shall conform, as far as practicable, to the provisions of this chapter. [66 v. 240, § 538.]

See §§ 1651-2.

ELECTIONS, ETC.

§ 2965. Fees of probate judge in connection with elections. A clerk of the court of common pleas, or probate judge, shall receive for his services under this

title, to be paid by the county, the following fees: For making out abstracts, for every hundred words, ten cents; for each certificate to abstract, with the seal of the court attached, fifty cents. [30 v. 311, § 52; 70 v. 272, § 1.]

§ 2983. Probate judge to act as clerk of elections. When. Whenever the clerk of the court of common pleas is dead or absent, or is prevented by any casualty from opening the returns of votes cast at any election, his deputy may act in his stead; and whenever in such case, such deputy is not present, or the office of clerk is not represented by deputy, it shall be the special duty of the probate judge of the county in which such election was held to attend immediately at the clerk's office, and taking to his assistance two justices of the peace of such county, proceed to open all the returns of election for such county made to such clerk's office, and perform the same duties that are required of the clerk of the court in such cases, under the provisions of this title. [50 v. 311, § 31.]

CONTEST OF ELECTION OF PROBATE JUDGE.

§ 2997. How appeal perfected in contest. The right of a person declared duly elected to any county office, or to the office of probate judge, may be contested by any elector of the county, by appeal to the court of common pleas of the county, when the contestor files notice of such appeal with the clerk of such court, and gives notice thereof, in writing, to the contestee, or leaves such notice at the house where he last resided, on or before the thirtieth day after the day of election; and the notice shall state the grounds of contest, and the names of two justices of the peace before whom depositions will be taken, and the place and a time, not less than ten nor more than twenty days from the day of service thereof, where and when such justices will attend to take the same. [61 v. 68, § 39; 74 v. 13, §§ 4, 5.]

Contest is the only remedy for fraud, errors etc., 14 O. S. 315; 15 O. S. 114; 31 O. S. 250. Injunction does not lie, 17 O. S. 271; nor mandamus after appeal, 14 O. S. 315; 15 O. S. 114; 26 O. S.

216. Notice of contest and appeal necessary to confer jurisdiction, 14 O. S. 568. The time within which an appeal may be taken counts from the day of the declaration of the clerk and justices, 31 O. S. 151. Contestor must show in his notice that he was a candidate or elector, 8 O. 375, and though the notice need not state facts sufficient to constitute a good cause of action, 16 O. S. 184, the "points" on which he relies must be stated therein with reasonable accuracy, *Id.*; and if they do not comply with the requirements of the law, the remedy is by objecting to the evidence under them and not by motion to dismiss, *Id.*

§ 2998. Justices to issue subpoenas for witnesses, etc. Such justices, or either of them, or officers before whom depositions are taken in the case, are authorized and required to issue subpoenas for all persons whose testimony may be required by either party, and subpoenas *duces tecum* for the production of the books, papers, ballots, or things relating to such election; and they may compel the attendance of witnesses, and the production of everything named in the subpoenas. [50 v. 311, § 40: 74 v. 12, § 2.]

§ 2999. Penalty for disobeying writ. Whoever refuses to obey such subpoena *duces tecum*, or to produce any books, papers, ballots, or things in his possession or under his control, named in such writ, shall be committed to the jail of the county by the justices or other officer, there to remain until he produces the things call for. [74 v. 12, § 3.]

§ 3000. Testimony to be certified, and transmitted to common pleas and contest there determined. The justices shall not receive testimony upon any point not named in the notice; and when met, they shall hear the testimony, and certify the same, including a copy of the notice, which shall be delivered to them by the contestor for that purpose, and the same shall be transmitted by them to the court of common pleas of the county, not less than thirty days after the day fixed in the notice to begin the taking of testimony; and the contest shall be heard and determined by the court, if then in session, and if not then in session, at the first term thereof thereafter. [84 v. 45; 50 v. 311, § 42.]

§ 3001. Either party may introduce testimony as in civil actions. How errors cured. On the trial either party may introduce oral testimony, or depositions of

witnesses taken as provided in civil actions; and whenever any omission, defect, or error occurs in the proceedings of an officer, in declaring or certifying that a person was duly elected to an office, the same may be corrected by oral or other testimony offered at the hearing of any preliminary proceeding, or at the trial. [74 v. 12, §§ 1, 2.]

Ballots evidence in contest, 19 O. S. 189. Poll books, 26 O. S. 549, and tally sheets are *prima facie* evidence, 21 O. S. 216; Judgment is not suspended by *supersedeas*, 14 O. S. 515. The finding and judgment of the common pleas are subject to review on error though no motion for a new trial has been interposed and overruled, 15 O. S. 572; 26 O. S. 549. Where the court find that neither party had a majority neither is elected, 21 O. S. 431.

§ 3002. When court shall hear the case, and how costs adjudged. Upon motion of either party, the court shall at once take up and determine any pending matter relating to the contest; otherwise the case shall be heard in the regular order of the docket; and the court shall render judgment against the party failing in the case for all the costs of the contest, including the costs of all depositions. [65 v. 13, § 1; 74 v. 12, § 4.]

DUTY OF PROBATE JUDGE, IN CONTEST OF ELECTION FOR COUNTY SEAT.

§ 3015. Who may contest election for county seat. Any elector of a county in which a law for removing the county seat of such county has been submitted to the electors thereof for adoption, shall have the right to contest the validity of the vote given at the election in that behalf, upon the question of the adoption of such law. [54 v. 229, § 1.]

§ 3016. Contestor's notice and undertaking. The elector so contesting shall, within twenty days after the day on which the election at which the question was submitted was held, file in the office of the probate judge of the county notice of his intention to contest the validity of the vote, and shall, within the same time, file in said office an undertaking to the state, to be approved by the probate judge, or in case

of his absence, disability, or refusal to act, by the clerk of the court of common pleas of the county, conditioned for the payment of all costs that accrue upon the contest, in the event that the result of the vote upon the question, as the same has been certified or returned, or otherwise made known, be not invalidated by and upon such contest; and it shall be competent for any other elector or electors of the county, under any such notice filed as aforesaid, to file in said office, within the time aforesaid, a like undertaking, to be in like manner approved, and to proceed with such contest, under such notice, in accordance with the provisions of this chapter, in the event that the party filing the notice fails to prosecute the contest at any stage of the same. [54 v. 229, § 2.]

§ 3017. **Publication of notice and appointment of commissioner.** The probate judge or clerk, upon the filing in his office of such notice or undertaking, shall publish, in some newspaper of general circulation in the county, the fact of the filing of the notice and undertaking, and shall, without delay, forward to the governor duly certified copies of such notice and undertaking or undertakings; the governor, on the receipt of such copies, shall, without delay, appoint some competent disinterested person to serve as commissioner, and perform the duties herein prescribed, in the matter of such contest; and in case of the death or disability of the commissioner, the governor may fill the vacancy. [54 v. 259, § 3.]

ADOPTION OF CHILDREN.

§ 3137. **How a child may be adopted.** An inhabitant of this state not married, or a husband and wife jointly, may petition the probate court of their proper county for leave to adopt a minor child not theirs by birth, and for a change of the name of such child; but a written consent must be given to such adoption by the child, if of the age of fourteen years, and by each of his or her living parents who is not hopelessly insane, intemperate, or has not abandoned

such child, or if there are no such parents, or if the parents are unknown, or have abandoned such child, or if they are hopelessly insane or intemperate, then by the legal guardian; or if there is no such guardian, then by a discreet and suitable person appointed by the court to act in the proceedings as the next friend of such child; but when such child is an inmate of an orphan asylum organized under the laws of this state, and has been previously abandoned by its parents or guardians, or voluntarily surrendered by its parents or guardians to the trustees or directors of such asylum, then the written consent of the president of the board of trustees or directors of such asylum, shall be received by the probate court in the place of the consent of the parents or guardians. [67 v. 14, § 1.]

Petition for adoption.

STATE OF OHIO, ——— COUNTY, *Probate Court.*

In the matter of the adoption of E F, and for a change of name.

To the Hon. ———, Judge of the Probate Court of ——— County:

The undersigned A B and C B his wife of ——— county and State of Ohio, petition the court for leave to adopt E F, a minor child, not theirs by birth, and for a change of the name of said child to E B. Said child was five years of age on the ——— day of ——— A. D. 1888, and they hereby produce the written consent of G F and H F, parents of said child.

Your petitioners are able to bring up and educate said child properly. [Signed.]

Consent of parents.—[Title.]—The undersigned represent that they are the parents of E F, a minor child of the age of five years. And they hereby consent to the adoption of said child by A B, and C B, his wife, of ——— county and State of Ohio. They also consent that the name of said child may be changed. [Signed.]

§ 3138. **How consent of wife ascertained.** When the petition is filed by husband and wife, the court shall examine the wife separate and apart from her husband, and shall refuse leave for such adoption unless satisfied, from such examination, that the wife, of her own free will and accord, desires the same. [56 v. 82 § 2.]

§ 3139. **The order of the court.** When the foregoing provisions are complied with, if the court is satisfied of the ability of the petitioner to bring up

and educate the child properly, having reference to to the degree and condition of the child's parents, and the fitness and propriety of such adoption, it shall make an order setting forth the facts, and declaring that, from that date, such child, to all legal intents and purposes, is the child of the petitioner, and that its name is thereby changed. [56 v. 82, § 3.]

['Title.]—The application of A B and C B, his wife, for the adoption of E F, a minor child, not theirs by birth, and for a change of the name of said child and the consent of the parents G F and H F to such adoption and change of name filed herein, this day came on for hearing. And the court having examined C B the wife of said petitioner separate and apart from her said husband, the court is satisfied from such examination that said C B of her own free will and accord desires such adoption. And the court being satisfied of the fitness and propriety of such adoption, and of the ability of said petitioners to bring up and educate said child properly; now, therefore, the court orders that such adoption be and is now made; and that from this date the said E F, minor child, to all intents and purposes is the child of the said A B and C B. And it is further ordered that the name of said child be and is now changed from E F to E B as prayed for in said petition.

§ 3140. **Effect of the order.** The natural parents shall, by such order, be divested of all legal rights and obligations in respect to the child, and the child be free from all legal obligations of obedience and maintenance in respect to them; such child shall be to all intents and purposes the child and legal heir of the person so adopting him or her, entitled to all the rights and privileges, and subject to all the obligations, of a child of such person, begotten in lawful wedlock; but on the decease of such person, and the subsequent decease of such adopted child, without issue, the property of such adopting parent shall descend to his or her next of kin, and not to the next of kin of such adopted child. [56 v. 82, § 4.]

Personal estate of adopted child passes to natural mother, 85 O. S. 655. Right to inherit limited to property of adopting parent, 41 O. S. 375. Agreement by a person to adopt another as his heir not enforceable. 15 Bull 190, in consideration of services within statute of frauds and not enforceable, *Id.* 338. Part performance sufficient to take it out of the statute, 1 C. C. R. 216. Curtesy of surviving husband not affected by adopted child of wife, 17 Bull 320.

§ 3140 a. Parent of vagrant or incorrigible child may be summoned to appear before probate court. When the parent or parents, of any minor child or children, shall be unable, through vagrancy, negligence or misconduct, to support such child or children, or, if able, shall neglect or refuse to support such child or children, or when such parent or parents shall unlawfully beat, injure, or otherwise habitually ill treat such child or children, or cause or allow them to engage in common begging, the probate court of the proper county, upon complaint by affidavit of some reputable citizen of the county in behalf of such child or children, setting forth facts bringing the case within this statute, may issue a summons requiring such parent or parents, to appear and answer such complaint; and if upon the hearing of the matters complained of, the court shall find the same to be true, and that it is for the best interest of such child or children to be taken from such parent or parents, the court may make an order to that effect, and direct the placing of such child or children in any suitable orphan asylum, or children's home, or with some other benevolent society, in the county, to be taken and cared for, and placed in homes found for them, by adoption or otherwise, by such asylum, children's home or society, upon the same terms and conditions as are required in case of other children given to such asylum, home or society, and the proper officers of such asylum, children's homes or society, are authorized to give the necessary consent in placing such children. [78 v. 203.]

DUTIES AND RIGHTS OF SURVIVING PARTNERS.

§ 3167. Duties of surviving partners. When a member of any partnership in the state dies, the surviving partner or partners shall, within thirty days after his death, make application to the probate judge of the county in which the partnership existed, upon first giving notice to the administrator or executor of the deceased partner of the application, for the ap-

pointment of three appraisers, whose duty it shall be to make out, under oath, a full and complete inventory and appraisement of the entire assets and liabilities of the partnership, and forthwith deliver the same to the probate judge, to be by him filed, but not recorded, in his office. [58 v. 36, § 1.]

§ 3168. When executor, etc., to have appraisement made. If the surviving partner or partners neglect or refuse to have such inventory and appraisement made, the administrator or executor of the deceased partner must, have the same made, in accordance with the provisions of the preceding sections. [58 v. 36, § 2.]

§ 3169. When survivor may purchase partnership property. The surviving partner or partners may, with the consent of the administrator or executor and the approval of the probate court by which the administrator or executor was appointed or qualified, take the assets of the partnership at the appraised value thereof, first deducting therefrom the debts and liabilities of the partnership, upon giving to the administrator or executor his or their promissory note, with good and approved security for the payment of the interest of the deceased partner in the partnership assets, in nine months from the time he or they so elect to take the partnership assets, and bond and security for the payment of the debts and liabilities of the partnership. [58 v. 36, § 3.]

The provisions of the third section of the act of March 21, 1861, (58 v. 36), may apply to a case where the surviving partner is also one of the personal representatives of the deceased partner, when the other representative assumes to act in the premises as the sole representative of the estate. The title of a surviving partner, who takes the assets of a partnership in proceedings had in the probate court under this act, is not vitiated by the facts that the appraisers were appointed by the probate court upon the recommendation of the parties, and that the appraisers returned under oath, as their report an inventory and appraisement previously made by them at the request of the surviving partner, and the personal representative of the deceased partner. Real estate purchased for partnership purposes, paid for with partnership funds, and actually used in the partnership business, should be regarded as partnership assets within the meaning of this statute; but real estate not needed or used for the partnership purposes, though paid for with partnership means, is not assets of the firm within the

meaning of this act, notwithstanding the rents and profits thereof be applied to partnership uses. *Rammelsberg v. Mitchell*, 29 O. S. 22; see 44 O. S. 69.

§ 3170. How partnership real estate to be conveyed. If any real estate is so appraised and elected to be taken, the probate court shall order that upon full payment of the notes, the administrator or executor shall execute and deliver to the purchaser his deed for the deceased partner's interest therein, and such conveyance shall pass the title thereto.

Application.—In the matter of the estate of C D, deceased. Probate court ——— county.

And now comes A B, and represents to the court that he is the surviving partner of A B & Co., which partnership existed in ——— county, Ohio, and consisted of A B, your petitioner, and C D, now deceased. And A B., as such surviving partner, makes application to the ——— probate judge of said county for the appointment of three appraisers to make out under oath a full and complete inventory and appraisement of the entire assets and liabilities of said partnership, and forthwith deliver the same to the judge of this court, in accordance with the statute in such case made and provided; and he suggests that E F, G H, and I J be appointed as such appraisers. (Signed.)

Entry—Appointing Appraisers. [Title.] On application of A B, surviving partner of the firm of A B & Co., which partnership existed in ——— county, Ohio, and consisted of A B & C D now deceased, and it appearing that notice of the application has been given to the administrator of the estate of C D deceased, it is ordered that E F G H and I J be and they are hereby appointed appraisers to make out under oath a full and complete inventory and appraisement of the entire assets and liabilities of said partnership and to deliver the same to the judge of this court.

Form of Notice.—To E F, G H and I J, Esqrs.: Whereas A. B., surviving partner of the late firm of A B & Co., heretofore doing business in the city of ——— in said county of ——— has made application to the undersigned probate judge of said county, for the appointment of appraisers to appraise the assets and liabilities of said partnership agreeable to the provisions of an act regulating the duties of surviving partners, passed March 21, 1861. Revised Statutes, §§ 3167, 3168, 3169 and 3170.

And you having been appointed by the probate judge of said county, to make such inventory and appraisal, these are therefore to authorize and require you to make (first being duly sworn) a full and complete inventory and appraisal of the entire assets and liabilities of said former firm of ——— and perform such other duties as by law are required of you in the premises; and to make and sign such inventory and appraisal, so that the same may be returned and filed in this court, as the law requires. In witness whereof I have hereunto set my hand and affixed the seal of said court at ——— this ——— day of ——— A. D. 188—. ———

Oath of Appraisers, etc.—State of Ohio—county, ss.: We, the undersigned, do make solemn oath that we will honestly and impartially make an inventory of all the assets and liabilities of the late firm of——and the same appraise and perform such other duties as are required by law of us in the premises, as such appraisers, according to law and the best of our ability. [*Signed.*]

Sworn to and subscribed before me this——day of——A. D. 188—.

We, the undersigned appraisers of the late partnership of——, being duly sworn, have made an inventory and appraisal thereof as hereinafter set forth.

PROCEEDINGS BEFORE PROBATE JUDGE TO COMPEL RAILROAD TO DRAIN LAND.

§ 3342. **Ways for water must be provided.** There shall be constructed and kept open, along the road-bed of every railroad, except where the road extends through or by swamp land, by the company or person operating the road, ditches or drains of sufficient depth, width and grade to conduct to some proper outlet the water which accumulates along the sides of such road bed from the construction or operation of such road. [66 v. 335. § 1].

§ 3343. **Proceedings to enforce preceding section.** If, after ten days' notice or request to any ticket or other agent of the company or person operating a railroad, to provide such drain or ditch, preferred by the person authorized, to institute the proceedings hereinafter provided for, the provisions of the foregoing sections be not complied with, any owner or tenant of land contiguous to such railroad, feeling aggrieved by such neglect, may give notice of the fact, in writing, to the probate judge of the county in which such neglect occurs, designating in such notice the place or places on such road where such drains or ditches have not been made; and upon the receipt of such notice the probate judge shall appoint a commission, of three disinterested freeholders of such county, who, together with the county surveyor, shall proceed to the place designated in the notice, and if, upon inspection, it is found that the provisions of the preceding section are not complied with, the commission, or a majority thereof, shall report the same to such

probate judge, who shall keep a record of such proceedings; and the probate judge shall designate a time within which such ditches or drains shall be made or opened, and shall forthwith notify the company or person operating such road, in writing, whose duty it shall be to make or open such ditches or drains within the time specified. [66 v. 335, § 2.]

§ 3344. **When the probate judge may let the work.** If such company or person neglect to comply with the notification of the probate judge, he shall forthwith, by advertisement for three consecutive weeks, in one or more of the weekly newspapers published in such county, give notice that the work of making or opening the ditches or drains will be let to the lowest bidder, at such time and place as shall be designated in the advertisement. [66 v. 335, § 3.]

§ 3345. **Sale of the work and proceedings thereon.** The probate judge shall, at the time and place specified in the advertisement, sell the job or jobs of making or opening such ditches or drains to the lowest bidder, and take from such bidder a sufficient bond, with surety, for the performance thereof, and upon the completion thereof to the satisfaction of the probate judge he shall give the bidder a certificate therefor, stating the amount due for the work; and upon presentation of the certificate to the auditor of the county, he shall place the amount so certified forthwith upon the tax duplicate of the county, against the company, together with all the costs and expenses for inspection by the commission and surveyor, notices, advertisements, sale of work, making contract therefor, approval of the work, and other costs, and interest on the amount certified to be due for the work from the time the work is approved until the amount can be collected by the treasurer of the county; and such tax shall be collected as other taxes, and be paid to the persons entitled thereto on the warrant of the county auditor on the county treasurer. [66 v. 335, § 4.]

§ 3346. **Fees of officers in such cases.** The probate judge, commissioners, and surveyor shall be entitled to receive for their services such costs, fees, and ex-

penses as are provided by law for costs, fees, and expenses of county commissioners and others under proceedings relating to ditches. [66 v. 335, § 5.]

APPROVAL OF BOND.

§ 3685. **Approval of bond of insurance company by probate judge.** Any insurance company which, by the terms of its charter, is required to have its official bonds approved by a judge of the court of common pleas, may, at its option, have the same approved by the probate judge of the county in which the office of the company is located. [54 v. 17, § 1.]

JOINT SUB-DISTRICTS.

§ 3930. **Joint sub-district.** Joint sub-districts may be established also in the manner provided in succeeding sections of this chapter.

Judgment of probate court final as to joint sub-district, 89 O. S. 259. Term "sub-district" does not apply to cities and villages, 19 O. S. 577. Attaching territory of one sub-district not consolidation, 25 O. S. 256 (70 v. 203.) All territory not included in separate belongs to sub-district, 21 O. S. 339.

§ 3931. **Joint sub-district may be established on petition.** Three or more qualified electors, resident of the territory sought to be included therein, may apply, in writing, to the board of education of any township wherein any part of the territory is situate, for the creation thereof. [75 v. 120, § 1.]

§ 3932. **What petition to contain.** The petition shall describe the territory sought to be included in the joint sub-district, may set forth the reasons requiring the creation thereof, and shall be filed with the clerk of the board of education to which it is addressed. [75 v. 120, § 2.]

§ 3933. **Clerks to give notice of filing, etc.** Upon the filing of such petition such clerk shall forthwith give notice thereof, in writing, to the members of the board of which he is clerk, which notices shall name a suitable and convenient place, and a day and hour, for the boards to meet; he shall also transmit a like notice, forthwith, to the clerks of all other boards of education having jurisdiction over any of the territory

sought to be affected; and such clerks, upon the receipt of such notice, shall in like manner give notice forthwith of the filing of such petition, and of the time and place of meeting, to each member of their respective boards. [75 v. 120, § 3.]

§ 3934. **When petition for joint sub-district may be filed with probate judge.** It shall be the duty of such boards to meet and consider the petition within thirty days from the time the same is filed, but if they do not do so within sixty days from such time, or having met, established, or determined not to establish a joint sub-district, three or more electors of the territory sought to be included therein may file a petition or remonstrance, for or against the same, with the probate judge of the county; and if the territory sought to be included therein is situated in two or more counties, the petition may be filed with the probate judge of either county. [75 v. 8.]

§ 3935. **Security for costs to be given.** The petitioners shall also file with the probate judge the undertaking of one or more of their number, with security to the satisfaction of the judge, in the sum of one hundred dollars, conditioned that the petitioners will pay all the costs of the proceeding if a joint sub-district be not established thereby. [73 v. 120, § 5.]

§ 3936. **Time and place of meeting of commissioners.** Upon the filing of such petition and undertaking, the judge shall fix a time, not more than sixty days thereafter, and a place, which shall be the school-house upon the territory, if there is one thereon, and if there is more than one school-house thereon, then the house last built, and if there is no school house thereon, then some convenient place within the territory, for the meeting of the commissioners hereinafter directed to be appointed. [75 v. 120, § 6.]

§ 3937. **Publication of notice.** The judge shall thereupon cause to be published, for four consecutive weeks, in two newspapers of opposite politics, printed and of general circulation in the county where the petition is filed, notice of the filing of such petition, and of the time and place of meeting of the commissioners. [75 v. 120, § 7.]

§ 3938. **Commissioners to be appointed.** The judge

shall also make an order appointing three judicious, disinterested men of the county, and not residents of either of the townships to be affected, to be commissioners, and to act in the premises; if a person so appointed die, or fail from any cause to be present and to act, or if he give notice of his inability to serve, the judge shall forthwith, by order, appoint another in his stead, who may act as if he had been originally appointed; and the judge shall deliver a copy of the petition and his order to the commissioners, and shall instruct them in the law applicable to such proceedings. [75 v. 120, § 8.]

§ 3939. Oath and duties of commissioners. The commissioners shall take an oath to discharge faithfully the duties required by this chapter, according to the best of their knowledge and understanding, and shall meet at the time and place named in the published notice, may examine witnesses under oath, which may be administered by one of their number, and consider and determine the question whether a joint sub-district ought to be established. [75 v. 120, § 9.]

§ 3940. Clerks to present plats and papers. The clerks of the several boards of education interested shall be present at the meeting of the commissioners, and have with them the plats of the several townships, with the lines of the several sub-districts marked thereon, and such other papers and documents as will serve to inform the commissioners, and give them a correct idea of the wants of the petitioners. [75 v. 120, § 10.]

§ 3941. Report of commissioners. The commissioners shall report, in writing, to the probate judge—

1. Whether or not a joint sub-district ought to be established, and their reasons therefor.

2. If they find in favor of the establishment of a joint sub-district, they shall give the lines and a plat thereof; they may also change the lines of the sub-district proposed in the petition, by including therein other territory, or excluding territory included therein, or both; and if there is no suitable school-house within such boundaries, or, if there is one,

but it is not suitably located, they shall designate a site whereon to erect such building. [75 v. 120, § 11.]

See § 3941 a 80 v. 62, providing for location of school-houses.

§ 3942. **Effect of report.** The report of the commissioners, if against the establishment of a joint sub-district, shall be a bar to any proceeding to establish a joint sub-district out of any of the territory described in the petition for three years; and if the report be in favor of the establishment of a joint sub-district it shall be final, unless set aside by the probate court for fraud. [75 v. 120, § 12.]

§ 3943. **Judgment for costs—what fees allowed.** If the report be against the establishment of a joint sub-district the judge shall render judgment against the petitioners for all the costs of the proceeding; and the commissioners and the judge shall receive the same fees as are authorized to be charged for like services in proceedings to establish roads, and such other fees as are authorized by law. [75 v. 120, § 13.]

§ 3944. **Report and judgment for sub-district.** If the report be in favor of the establishment of a joint sub-district the judge shall make an entry confirming the same; and a certified copy of the report, including the plat and his order, shall be delivered to the clerk of the board of education of each township interested therein, and thereafter such joint sub-district shall be fully established, and shall be governed and controlled in the same manner as joint sub-districts otherwise established. [75 v. 120, § 14.]

Probate court can confirm report dissolving, 39 O. S. 151.

§ 3945. **How costs paid in such case.** In such case the judge shall tax the costs of the proceedings to the board of education of the several townships interested, in such proportion as he may deem just and equitable, and certify the same to the clerks of such boards; and the boards shall be liable therefor, and at the first regular or special meeting of each thereafter payment of the amount so taxed to it shall be ordered. [75 v. 120, § 15.]

§ 3946. **Petition for additional sub-district, etc.** A

petition may, in like manner, be filed with the clerk of the board of education of any township, praying for the creation of an additional sub-district, or for changing the lines of sub-districts, or for the creation of a special school district, or for changing the lines of special or village districts, and adjoining sub-districts; but when a special or village district is interested in such proposed change, the petition may be filed either with the clerk of the township board, or the clerk of the board of education of such special or village district; and when any such lines have been so changed they shall not be altered by any board or boards of education until after the expiration of three years, except upon the written consent of two-thirds of the electors residing within the territory affected by the change. [75 v. 120, § 16.]

The provisions of this section are applicable only between districts and adjoining sub-districts, 8 Bull 312. Special districts may be created in same manner as joint sub-districts, 8 Rec. 362.

§ 3947. **Proceedings thereon.** Such petition may be filed with the clerk of the board of education of such special or village district, with the clerk of the board of education of the township, or, if the changes sought by the petition affect territory in more than one township, with the clerk of the board of education of either township; and, upon the filing thereof, the members of the board or boards interested shall be notified as provided in § 3933. [75 v. 120, § 17.]

§ 3948. **When such petition may be filed with probate judge.** It shall be the duty of such board or boards to meet and consider the petition within thirty days from the time the same is filed, but on failure to do so within sixty days of such time, or if the board or boards meet and grant, or refuse to grant, the prayer of the petition, a petition or a remonstrance may be filed with the probate judge of the county, by either party, as provided in § 3934 and, thereafter, such proceedings may be had thereon, and they shall have the same effect as is herein provided for the formation of joint sub-districts. [78 v. 9.]

DESCENT AND DISTRIBUTION.

§ 4158. Order of descent of real estate where title came by descent, devise or deed of gift. When a person dies intestate, having title or right to any real estate or inheritance in this state, which title came to such intestate by descent, devise, or deed of gift from an ancestor, such estate shall descend and pass in parcenary to his or her kindred in the following course:

1.—To the children of such intestate, or their legal representatives.

2.—If there are no children or their legal representatives living, the estate shall pass to and vest in the husband or wife, relict of such intestate, during his or her natural life.

3.—If such intestate leave no husband or wife, relict of himself or herself, or at the death of such relict, the estate shall pass to and vest in the brothers and sisters of the intestate who are of the blood of the ancestor from whom the estate came, or their legal representatives, whether such brothers and sisters be of the whole or half blood of the intestate.

4.—If there are no brothers or sisters of the intestate of the blood of the ancestor from whom the estate came, or their legal representatives, and the estate came by deed of gift from an ancestor who is living, the estate shall ascend to such ancestors.

5.—If the ancestor from whom the estate came is deceased, the estate shall pass to and vest in the children of the ancestor from whom the estate came, or their legal representatives; if there are no children of the ancestor from whom the estate came, or their legal representatives, the estate shall pass to and vest in the husband or wife, relict of such ancestor, if a parent of the decedent, during the life of such relict; and on the death of such husband or wife, or if there is no such husband or wife, the estate shall pass to and vest in the brothers and sisters of such ancestors, or their legal representatives; and for want of such brothers and sisters, or their legal representatives, to the brothers and sisters of the half blood of the intestate, or their legal representatives, though such brothers and sisters are not of

the blood of the ancestor from whom the estate came.

6.—If there are no such half-brothers and sisters of the intestate, or their legal representatives, the estate shall pass to the next of kin to the intestate of the blood of the ancestors from whom the estate came, or their legal representatives. [62 v. 32, § 1.]

An ancestor is one from whom the claimant has the capacity to inherit, 2 H. 52. What is ancestral and what not ancestral property, 25 O. S. 451; 14 O. 368. After partition heirs hold by descent, 17 O. S. 527. If heir elects to take land in partition only his share is ancestral, *Id.*

In absence of children and brothers and sisters or their representatives lands inherited from father pass to brothers and sisters of the father. 19 O. 36 (1850).

Property descending from father to son and from son to daughter passes on her death without issue to her father's half-brothers and sisters, though not of the blood of her grandfather, 19 O. S. 531. The fifth clause of section 1 of act S. & C. 501, is not an adjunct of the fourth clause and applies to both classes of estates, *Id.* Ancestral estates descend to brothers and sisters of ancestor if deceased left no brothers or sisters or their representatives and no issue, 40 O. S. 211. Words "brothers and sisters" include half-brothers and sisters, 8 O. S. 501, include posthumous child, 2 H. 52.

Degrees of consanguinity to be computed according to the civil law, 17 O. S. 367. Words "next of kin" do not imply principle of representation. Grand uncles and aunts take to the exclusion of issue of grand uncles deceased, *Id.* The "ancestor from whom the estate came" is the ancestor from whom the estate came immediately to the intestate by descent, devise or deed of gift, *Id.*; 3 O. S. 394. See 45 O. S. 78.

§ 4159. Order of descent where estate came by purchase, etc. If the estate came not by descent, devise or deed of gift it shall descend and pass as follows.

1.—To the children of the intestate and their legal representatives.

2.—If there are no children, or legal representatives, the estate shall pass to and be vested in the husband or wife, relict of such intestate.

3.—If such intestate leaves no husband or wife, relict to himself or herself, the estate shall pass to the brothers and sisters of the intestate of the whole blood, and their legal representatives.

4.—If there are no brothers or sisters of the intestate of the whole blood, or their legal representatives, the estate shall pass to the brothers and

sisters of the half-blood, and their legal representatives.

5.—If there are no brothers or sisters of the intestate of the half-blood, or their legal representatives, the estate shall ascend to the father; if the father is dead, then to the mother.

6.—If the father and mother are dead, the estate shall pass to the next of kin, and their legal representatives, to and of the blood of the intestate. [62 v. 32, § 2.]

Expectancy does not descend, 31 O. S. 640. Testator not ancestor of devisee not of kin, 16 O. S. 30 (1847). When heirs take *per capita* and when *per stirpes*, 9 O. S. 327. If heirs exchange land it ceases to be ancestral, 18 O. S. 311. Estate coming to wife from deceased husband not ancestral, 18 O. S. 311; 11 O. S. 426. Blood of intestate preferred to that of ancestor, 18 O. S. 311. Under act 1840 widow was entitled to her designated share of the estate whether testator left child or not, 11 O. S. 1. See 3 C. C. R. 186; 45 O. S. 73; 38 O. S. 473.

§ 4160. When real estate to pass to husband or wife; when to next of kin of intestate. When a person dies intestate, having title or right to any real estate or inheritance, as provided in § 4158, and leaves husband or wife, relict of himself or herself, and there is no person who, under the provisions of that section, would be entitled to inherit the same, or an estate therein, save and except such husband or wife, relict of such intestate, then the estate shall pass to and vest in the husband or wife of the intestate as an estate of inheritance; and if there is no such person, and no husband or wife relict of the intestate, then the estate shall pass to and vest in the next of kin of the intestate, though not of the blood of the ancestor from whom the estate came. [59 v. 50, § 3.]

25 O. S. 451.

§ 4161. When real estate to pass to children of former husband or wife, etc. When a person dies intestate, having title or right to any real estate or inheritance, whether by descent, devise or deed of gift from any ancestor, or acquired, and there is no person entitled to inherit the same under the preceding sections [of this chapter], then the estate shall pass to and vest in the children of any deceased husband or husbands, wife or wives of the intestate, whose marriage with

the intestate was not annulled prior to his, her or their death, or their legal representatives; if there are no children, or their legal representatives, living, then the estate shall pass to the brothers and sisters of any such husband or wife, or their legal representatives; if there are no brothers or sisters nor their legal representatives, the estate shall pass to the next of kin of such intestate; and if there are none such, then the estate shall escheat and be vested in the State of Ohio. [59 v. 50, § 3.]

Escheats, 4 O. S. 354.

§ 4162. Descent of estate which came from former husband or wife. When the relict of a deceased husband or wife shall die intestate and without issue, possessed of any real estate or personal property which came to such intestate from any former deceased husband or wife by deed or gift, devise or bequest, or under the provisions of § 4159, then such estate, real and personal, shall pass to and vest in the children of said deceased husband or wife, or the legal representatives of such children. If there are no children or their legal representatives living, then such estate real and personal, shall pass and descend one half to the brothers and sisters of such intestate, or their legal representatives, and one half to the brothers and sisters of such deceased husband or wife from which such personal or real estate came, or their personal representatives. [78 v. 107; 74 v. 81, § 1.]

Legislature may change course of descent. Such laws not retro-active and do not impair contract rights, 8 Bull 21. The words "relict of a deceased husband or wife" as used in this section are used to designate the relationship to a former married pair, of the survivor of a marriage union; and such relationship is not destroyed or changed by the subsequent marriage of such survivor, 42 O. S. 100. The term "former deceased husband" refers to *any* husband who has deceased leaving a widow to whom any real estate or personal property has passed by virtue of the provisions of this section and is not confined in its application to cases where the widow has had two or more husbands who are deceased, 44 O. S. 440.

§ 4163. Distribution of personal estate. When a person dies intestate and leaves any personal property, such personal property shall be distributed in the manner prescribed in § 4159 as to real pro-

perty which came not by descent, devise or deed of gift from any ancestor, saving however, such right as any widow or widower may have to any portion of such personal property; but if there is no person living entitled to inherit the same by the provisions of this chapter, such personal property shall pass to and be vested in the state; and the prosecuting attorney of the county in which letters of administration are granted upon such estate, shall collect the same and pay it over to the treasurer of such county, to be applied exclusively to the support of the common schools of the county in which the estate is so collected in such manner as may be prescribed by law. [84 v. 134.]

§ 4164. **When estate to descend to children of intestate and how.** When a person dies intestate leaving children, and none of the children of such intestate have died leaving children or their legal representatives, such estate shall descend to the children of such intestate, living at the time of his or her death, in equal proportions. [51 y. 499, § 5.]

§ 4165. **Descent when all descendants of equal degree of consanguinity.** When all the descendants of an intestate, in a direct line of descent, are of an equal degree of consanguinity to the intestate, whether children, grandchildren, or great-grandchildren, or of a more remote degree of consanguinity to such intestate, the estate shall pass to such persons of equal degree of consanguinity to such intestate in equal parts, however remote from the intestate such equal and common degree of consanguinity may be. [51 v. 499, § 6.]

§ 4166. **When there are living both children and heirs of deceased children of intestate.** If any of the children of such intestate are living, and any are dead, the estate shall descend to the children of such intestate who are living, and to the legal representatives of such of his or her children as are dead, so that each child of the intestate who is living shall inherit the share to which he or she would have been entitled if

all the children of the intestate were living, and so that the legal representatives of the deceased child or children of the intestate shall inherit equal parts of that portion of the estate to which such deceased child or children would be entitled if such deceased child or children were living. [51 v. 499, § 7.]

§ 4167. **Extent of application of last section.** The provisions of the last preceding section shall be construed to apply in all cases in which the descendants of the intestate, entitled to share in the estate, are of unequal degree of consanguinity to the intestate, so that those who are of the nearest degree of consanguinity shall take the share to which he or she would have been entitled, had all the descendants in the same degree of consanguinity with him or her, who died leaving issue, been living. [51 v. 499, § 8.]

§ 4168. The provisions of §§ 4164, 4165, 4166 and 4167 shall apply both to personal and real estate. [51 v. 499, § 9.]

§ 4169. **Advancements by intestate to be considered as part of estate.** If any estate, real or personal, has been given by any intestate in his lifetime as an advancement to any child or children of such intestate or their descendants, it shall be considered and held to be a part of the estate of the intestate, so far as it regards the division and distribution thereof, among his or her children or their descendants, and shall be taken by such child or children or their descendants toward his or her share of the estate of the intestate. [51 v. 499, § 10.]

The act of 1853 does not provide for advancements as to personalty, 18 O. 347. If one purchase property and take title in the name of child, this is *prima facie* an advancement, 18 O. 418; 1 O. S. 1; 6 O. S. 52. The partial distribution of an estate by will, does not exclude the operation of the statutory provisions relating to advancements, 22 O. S. 436; see 21 O. S. 527. Release by heir not binding, 7 O. S. 482. Construction of receipt for, 17 O. S. 157. Gift to son-in-law, when charged to wife, 22 O. S. 436. See 26 O. S. 169; 42 O. S. 314. Interest on not allowed, 31 O. S. 657. Advancements of real estate can not be made by parol, 2 D. 604. Parol promise of heir to pay debts binding, 24 O. S. 432. Statute of 1853 not retro-active, 5 W. L. M. 194. Whether transfer of personal property to son is an advancement depends upon the intention of the parties at the time, 1 C. C. R. 420, 423.

§ 4170. **When advancement is greater or less than**

heirs, share. If the amount of such advancement equals or exceeds the share of the heir to whom such advancement has been made, he or she shall be excluded from any further portion in the division or distribution of the estate, but shall not be required to refund any part of such advancement; and if the amount so advanced is less than his or her full share, he or she shall be entitled to as much more as will give him or her, his or her full share of the estate of the intestate. [51 v. 499, § 11.]

§ 4171. **When advancement is wholly real or personal estate.** If any such advancement is made in real estate, the value thereof shall be considered and taken as a part of the real estate to be divided, and if in money or other personal estate, it shall be considered and taken as a part of the personal estate to be distributed; and if, in either case, it exceeds the share of the real or personal estate that would have come to the heir to whom such advancement was made, he or she shall not refund any part of it, but shall receive so much less out of the other part of the estate of the intestate, as will make his or her whole share equal, as near as can be estimated, to that of either of the other heirs who are in the same degree of consanguinity with him or her. [51 v. 499, § 12.]

§ 4172. **When value of advancement expressed in deed, etc.** If the value of the estate, real or personal, so advanced, is expressed in the deed of conveyance, or in the charge thereof, made by the intestate, or in the receipt in writing, given by the person receiving such advancement, it shall be considered and taken to be of that value, in the division and distribution of the estate, otherwise it shall be estimated at its value when advanced. [51 v. 499, § 13.]

§ 4173. **Heirs of aliens may inherit; aliens may hold lands.** No person who is capable of inheriting shall be deprived of the inheritance by reason of any of his or her ancestors having been aliens; and aliens may hold, possess, and enjoy lands, tenements, and hereditaments, within this state, either by descent, devise, gift or purchase, as fully and completely as

any citizen of the United States or this state can do. [51 v. 499, § 14; 29 v. 462, § 1.]

§ 4174. **Capability of bastards as to inheritance.** Bastards shall be capable of inheriting or transmitting inheritance from and to the mother, and from and to those from whom she may inherit, or to whom she may transmit inheritance, in like manner as if born in lawful wedlock. [64 v. 105, § 15.]

Bastard's estate did not pass to maternal line under act of 1831, 8 O. S. 289; but did under act 1853, 4 O. S. 354; 11 O. S. 131; but gave no right to inherit from mother's relatives, *Id.* Bastard's estate acquired by purchase passed to his widow in absence of issue under act 1831, 19 O. S. 22. Inheritance by bastard did not affect curtesy, 39 O. S. 478. Bastard does not take under devise to mother and her issue, 11 O. S. 131. (1860.)

§ 4175. **When illegitimate children deemed legitimate, etc.** When a man has by a woman one or more children, and afterward intermarries with her, such issue, if acknowledged by him as his child or children, shall be deemed legitimate; and the issue of parents whose marriage is deemed null in law, shall nevertheless be legitimate. [51 v. 499, § 16.]

Children of void marriage recognized by a father inherit from him under act of 1831, 12 O. S. 619, though mother was wife of another man when child was begotten, 1 W. L. M. 346. Issue of slave marriage lawful heirs, 39 O. S. 554, 558.

§ 4176. **Amount of personal estate to which a widow or widower is entitled upon distribution.** When a person dies intestate and leaves no children or their legal representatives, the widow or widower shall be entitled, as next of kin, to all the personal property which is subject to distribution upon settlement of the estate; but if the intestate leaves any children or their legal representatives, the widow or widower shall be entitled to one-half of the first four hundred dollars and to one-third of the remainder of the personal property subject to distribution. [84 v. 134; 38 v. 146, § 180.]

Estate by curtesy abolished, saving vested rights, 84 v. 136. Curtesy "initiate" abolished, 39 O. S. 516, 624. Seizin of wife was not necessary, 2 O. S. 308, 377; 5 O. S. 307, nor birth of issue, 24 O. S. 416. Curtesy was not affected by the statute of entails, *Id.*, nor by partition unless husband made a party, 9 O. 117, nor by illegitimate children of wife, 39 O. S. 478; or adopted child, 17 Bull. 320; was the same whether the estate came by deed or devise, 24 O. S. 430. Act 1853 (S. & C. 504), did not

change husband's rights during wife's life, 35 O. S. 576; but without issue he took curtesy as against heirs of a former husband only in lands acquired by devise or deed of gift from him or his ancestors, 40 O. S. 411. Husband could not be tenant by curtesy of remainder expectant upon life estate unless the latter was determined during coverture, 11 O. S. 367; could not be sold for mechanic's lien, 13 O. S. 131; nor for husband's debts during life of children under S. & C. 391; 41 O. S. 225. Judgment against tenant by curtesy not binding on tenant in fee, 22 O. S. 208.

§ 4177. **Waste by tenant for life, etc.** A tenant for life in real property, who commits or suffers any waste thereto, shall forfeit that part of the real property of which such waste is committed or suffered to the person having the immediate estate in reversion or remainder; and such tenant for life is liable in damages to the person having the immediate estate in reversion or remainder for the waste committed or suffered thereto. [84 v. 134.]

2 O. S. 180; 21 O. S. 362.

§ 4178. **Construction of words, "living" and "died."** Whenever in this chapter a person is described as living, it shall be understood to mean that he or she was living at the time of the death of the intestate from whom the estate came, and whenever a person is described as having died, it shall be understood to mean that he or she died before such intestate. [51 v. 499, § 18.]

§ 4179. **Posthumous child of intestate to inherit.** Descendants of the intestate begotten before his or her death, but born thereafter, shall in all cases inherit in the same manner as if they had been born in the lifetime of the intestate, and had survived him or her; but in no other case shall any person inherit, unless living at the time of the death of the intestate. [59 v. 50, § 19.]

§ 4180. **Application of provisions relating to escheated estates.** The provisions of this chapter as to the cases in which real or personal estate shall escheat to the State of Ohio, shall apply to any such estate of which possession has not been taken, or which has not been collected by the proper officers of the state, or those acting under their authority; and any right or claim of the state thereto is hereby

relinquished to the person who would have been entitled thereto had this chapter been in force at the time of the death of the intestate. [59 v. 50, § 4.]

§ 4181. **Permanent leases to descend same as estates in fee.** Permanent leasehold estates, renewable forever, shall be subject to the same law of descent as estates in fee are subject to by the provisions of this chapter. [51 v. 499, § 22.]

§ 4182. **Heir at law how designated, etc.** A person of sound mind and memory may appear before the probate judge of his county, and in the presence of such judge and two disinterested persons of his or her acquaintance, file a written declaration, subscribed by him, which declaration shall be attested by such disinterested persons, declaring that, as his or her free and voluntary act, he or she did designate and appoint another, naming and stating the place of residence of such person specifically, to stand toward him or her in the relation of an heir at law in the event of his or her death; thereupon the judge, if satisfied that such declarant is of sound mind and memory, and free from any restraint, shall enter that fact upon his journal, and make a complete record of such proceedings; thenceforward the person thus designated shall be deemed and held to stand in the same relation, for all purposes, to such declarant as he or she could, if a child born in lawful wedlock; the rules of inheritance shall be the same, between him and the relations by blood of the declarant, as if so born; and a certified copy of such record shall be *prima facie* evidence of the fact stated therein, and conclusive evidence, unless impeached for actual fraud, or undue influence. [52 v. 78, § 1.]

The acts of 1854 and 1859 gave to the adopted heir the status of a child of the adopter, and required him to be regarded as such child in tracing descent to or from him in the cases therein specified; but in cases which did not come within those acts, the operation of the statute of descents is the same as if those acts had not been passed, 25 O. S. 451.

§ 4183. **County auditor to take possession of and sell escheated lands.** Any real property escheated to the state, except in a city of the first grade of the first

class, shall be taken possession of, in the name of the state, by the auditor of the county in which it is found, and by him sold at public auction, at the county seat of the county, to the highest bidder, after having given thirty days' notice of such intended sale, in some newspaper printed within the county. [45 v. 43, §§ 3, 7.]

§ 4184. **Appraisal, terms of sale and deed.** The court of common pleas shall, on the application of the county auditor, appoint three disinterested freeholders of the county, to appraise such real property, who shall be governed by the same rule as appraisers in sheriffs' or administrators' sales; and the auditor shall sell such property at not less than two-thirds its appraised value, and may, in his discretion, sell the same for cash, or for one-third cash, and the balance in equal annual payments, the deferred payments to be amply secured; upon the payment of the whole amount of consideration money, he shall execute a deed to the purchaser, in the name and on behalf of the State of Ohio; and the proceeds of such sales shall be paid by the auditor to the county treasurer. [45 v. 43, §§ 4, 5.]

§ 4185. **When lands sold, how proceeds disposed of.** The county treasurer shall pay the proceeds, not exceeding six hundred dollars in any case, of a sale of escheated lands to the regularly organized agricultural society within the county, and the excess of such proceeds, or the whole thereof, if there be no such society within the county, to the treasurer of state, as other moneys collected for state purposes, for the use of the state agricultural fund. [53 v. 35, §§ 1, 2, 3; 45 v. 43, § 5.]

§ 4186. **Disposition of escheated lands and rents in Cincinnati.** Lands within a city of the first grade of the first class, which have escheated, or which may hereafter escheat, to the State of Ohio, shall be taken possession of by such [the] city council, for and on behalf of such city, and the title of all such lands shall vest in such city; the city council shall cause the same to be let at such price, and for such purposes, as it may

deem proper; and all rents arising from such escheated lands shall, after deducting all necessary expenses, be paid, as they become due, into the hands of the directors of the house of refuge and correction of such city, to be appropriated by such directors for the use and benefit of the institution. [45 v. 43, §§ 7, 8, 9.]

§ 4187. **When such lands to revert to state.** If the objects and intentions of the establishment of said house of refuge and correction are hereafter abandoned or suspended, or if the rents of such escheated lands are appropriated to any other purpose than that designated by the preceding section, such lands shall thereby and from thence revert to the state. [45 v. 43, § 10.]

ESTATES IN DOWER.

§ 4188. **Of what estates a widow or widower endowed.** A widow or widower who has not relinquished or been barred of the same, shall be endowed of an estate for life in one-third of all the real property of which the deceased consort was seized as an estate of inheritance at any time during the marriage, and in one-third of all the real property of which the deceased consort, at decease, held the fee simple in reversion or remainder, and also in one-third of all the title or interest that the deceased consort had, at decease, in any real property held by article, bond, or other evidence of claim; and the widow or widower may remain in the mansion house of the deceased consort, free of charge, for one year, if dower is not sooner assigned; but dower shall not be assigned to any widow or widower in any real property of which the deceased consort, at decease, held the fee simple in reversion or remainder, until the termination of the prior estate. [84 v. 135.]

Widow entitled to dower in surplus in foreclosure, 21 O. S. 509; 27 O. S. 464, 512; 32 O. S. 210. When mortgage debt is paid, 16 O. S. 193; 28 O. S. 503; in entire proceeds, 40 O. S. 391; 8 O. S. 234; in equity of redemption existing at marriage, 1 D. 121; in wild land, 8 O. 418; in surplus after paying charge on land devised, 39 O. S. 172; in equitable estate of husband only when

owned at time of his decease, 38 O. S. 605; but not in trust estates, 8 O. 412, nor in perpetual lease, 2 Bull 92; see 7 Bull 159; nor land sold for taxes, 8 O. S. 430, nor partnership lands of insolvent firm, 1 O. 535; 8 *Id.* 328; nor dedicated property, 3 O. 24; nor stock in railroad company, 1 O. S. 350; nor in lands of which husband had but a vested remainder in fee at the time of his death and of which the freehold had not then terminated, 2 C. C. R. 136 (act 1843), nor in land of husband subject to devise over in case of his dying before his brother, 12 Bull 90; nor in equity of redemption unless owned by husband at his death, 1 C. S. C. R. 268; lien for purchase money superior to dower, 22 O. S. 435; 27 O. S. 512; unassigned dower may be subjected to payment of her debts, 41 O. S. 540.

Dower is barred by adultery of husband or wife, § 4192; by deed of husband and wife, 16 O. 191; 7 O. (pt. 1), 194; by deed of wife and attorney of husband, 8 O. 72; by sale by administrator on mortgage of husband and wife, 9 O. 15; by divorce for her aggression, § 5700; but not by deed of husband and wife, in which she does not join in the grant or release dower, 3 O. S. 75; nor by fraudulent conveyance of her and husband, 5 O. S. 70; 23 O. S. 294; nor by her deed without husband joining, 13 O. S. 565, nor by foreclosure, 15 O. S. 485; nor by divorce for husband's aggression, § 5699; though she marries again, 44 O. S. 645; contra, 10 O. S. 596 (act 1824.)

§ 4189. Conveyance in lieu of dower. The conveyance of an estate or interest in real property, to a person in lieu of dower, to take effect on the death of the grantor, shall, if accepted by the grantee, bar the grantee's right of dower in the real property of the grantor, but if the conveyance was made when the grantee was within the age of minority, or during the marriage, the grantee may waive title to such real property and demand dower. [84 v. 135.]

An estate conveyed as jointure to be a good legal, or statutory bar to dower must be such an estate as to certainty and kind as that the wife on the death of her husband may take possession of and hold in severalty, and not in common with others, 27 O. S. 50. May elect as to dower or jointure, 39 O. S. 642.

§ 4190. Effect of defective conveyance in lieu of dower. When a conveyance which is intended to be in lieu of dower, fails through any defect to be a legal bar thereto, and the widow or widower availing of such defect demands dower, the estate or interest conveyed to such widow or widower, with the intention to bar dower, shall thereupon cease. [84 v. 135.]

§ 4191. Effect of eviction from premises conveyed in lieu of dower. A widow or widower lawfully evicted from real property conveyed in lieu of dower, or any

part thereof, shall be endowed of so much of the residue of the real property of the deceased consort as will equal that from which such widow or widower is evicted. [84 v. 135.]

§ 4192. **When person dwelling in adultery is barred of dower.** A husband or wife who leaves the other and dwells in adultery, shall be barred of the right of dower in the real property of the other, unless the offense is condoned by the injured consort. [84 v. 135.]

§ 4193. **Where lands are given up by fraud, etc.** If a husband or wife give up any real property by collusion or fraud, or loses the same by default, the widow or widower may recover dower in the same. [84 v. 135.]

§ 4194. **Dower is forfeited by waste.** A tenant in dower in real property who commits or suffers any waste thereto, shall forfeit that part of the real property to which such waste is committed or suffered, to the person having the immediate estate in reversion or remainder; and such tenant in dower is liable in damages to the person having the immediate estate in reversion or remainder for the waste committed or suffered thereto. [84 v. 135, 6.]

21 O. S. 362, "All the provisions of law relating to the assignment of the dower of a wife, shall apply to the assignment of the dower of a husband as far as applicable," 84 v. 135, 136.

ENTAILED ESTATES.

§ 4200. **Entailed estates pass to issue of first donee.** No estate in fee simple, fee tail, or any lesser estate, in lands or tenements, lying within this state, shall be given or granted, by deed or will, to any person or persons but such as are in being, or to the immediate issue or descendants of such as are in being at the time of making such deed or will; and all estates given in tail shall be and remain an absolute estate in fee simple to the issue of the first donee in tail. [29 v. 463, § 1.]

17 O. S. 439; 27 O. S. 86; 11 O. S. 131, 178; § 5808. See 25 O. S. 283; 33 O. S. 213; 11 Bull 286.

APPOINTMENT OF INSPECTORS BY PROBATE JUDGE.

§ 4277. **Appointment of inspectors.** The probate judge of each county shall appoint, when it may be necessary, to serve for the term of three years, one gauger and inspector of domestic and foreign spirits, linseed oil, lard oil and coal oil; one inspector of flour, meal and biscuit; one inspector of beef, pork, lard and butter; one inspector of pot and pearl ashes; one inspector of fish; one inspector of sawed lumber and shingles; and one inspector of salt, who shall each have the power of appointing as many deputies to act under them as their respective duties in office may require; and the court may, on complaint and sufficient cause shown, remove any inspector, and fill all vacancies for unexpired term. [58 v. 105; 40 v. 26; 29 v. 447, § 25.]

§ 4278. **Oath and bond.** Before any inspector or deputy inspector shall enter upon the duties of his office, he shall take an oath that he will faithfully and impartially execute the duties required of him by law; and each inspector shall, moreover, enter into bond, with sufficient freehold security, to be approved by the court, in such sum as the court may require, not less than three hundred nor more than one thousand dollars, made payable to the state; which bond, conditioned for the faithful and impartial performance of the duties required of him by law, shall be deposited with the treasurer of such county. [29 v. 477, § 2.]

§ 4334. **Appointment of tobacco inspector.** The probate court of any county, upon application of the proprietor of any leaf tobacco commission warehouse, who offers for sale tobacco at public auction, shall qualify the appointee of such commission warehouse of one or more suitable persons, well skilled in the inspection of leaf tobacco, to act as inspectors and weighers of tobacco at such commission warehouse, to serve as such during the pleasure of such warehouseman and until successors shall be appointed and qualified, and the court shall thereupon also grant a license to the proprietor of such warehouse to con-

duct his business in accordance with the provisions of this chapter. [78 v. 242.]

38 O. S. 555.

§ 4336. **Warehouseman's bond.** Before granting any license for the establishment of a tobacco warehouse, the court shall require the proprietor of such warehouse to enter into bond, payable to the state, in the penal sum of twenty thousand dollars, with at least one sufficient surety, resident in the county, conditioned for the faithful discharge of all duties devolved upon him by this chapter, which shall be filed in the probate court, granting a license for the use of any person who may be aggrieved by the non-fulfillment of such duties. [53 v. 57, § 6.]

§ 4337. **Fees for issuing license, etc.** The fees for issuing such license shall be five dollars, and for appointing inspectors and approving their bond, three dollars, [53 v. 67, § 7.]

§ 4338. **Entry of appointment in journal.** The court shall cause an entry of the appointment of an inspector to be made on the journal of the court, and a certificate of his appointment, under the seal of the court, shall be delivered to the person so appointed. [24 v. 67, § 2.]

§ 4339. **Form of inspector's oath.** Every inspector of tobacco, before he acts as such, shall, under the penalty of three hundred dollars, take the following oath of office: "I, A B. appointed inspector of tobacco, at _____ warehouse, do swear that I will, in all things, faithfully discharge my duty in the office of inspector according to the best of my skill and judgment, according to law, without fear, favor, affection, malice or partiality, so help me God;" which oath any justice of the peace may administer, a copy of which shall be transmitted to the court appointing the inspector, within ten days from the time the oath has been administered. [24 v. 67, § 3.]

§ 4340. **Inspector's bond.** Every such inspector and weigher before he executes any part of his duty, shall, under the penalty of eight hundred dollars, enter into bond, in the penal sum of two thousand

dollars, to the satisfaction of the probate judge, with sufficient sureties, payable to the state, for the use of any person injured by the neglect or misconduct of such inspector and weigher, with condition that such inspector will diligently and carefully uncase and break, in at least four places, or cause the same to be done in his presence, view and examine all tobacco brought to the warehouse at which he is inspector and weigher, which he is called on to view, weigh and inspect at such warehouse, or any other public warehouse; and that he will not receive, weigh, pass or mark, any tobacco or hogshead, barrel, box or case of tobacco prohibited by this chapter, and that he will, in all things, well and faithfully discharge and execute his duty in the office of inspector and weigher, according to the provisions of this chapter, which bond shall be deposited with the said probate judge, who shall file the same in his office, and any person injured may bring suit thereon for a breach thereof. [78 v. 242.]

APPEAL TO PROBATE COURT IN COUNTY DITCH CASES.

§ 4463. Any person or corporation aggrieved thereby may appeal from any final order or judgment of the commissioners made in the proceeding and entered upon their journal, determining either of the following matters, viz:

1. Whether said ditch will be conducive to the public health, convenience, or welfare.
2. Whether the route thereof is practicable.
3. The compensation for land appropriated.
4. The damage claimed to property affected by the improvement, and the appellant shall file with the commissioners, at the final hearing before them, a notice, in writing, of an intention so to do, and specifying therein the matter appealed from; the commissioners shall fix the amount of the bond to be given by the appellant, and cause an entry thereof, and of the notice, to be made upon their journal; the party appealing shall, within ten days thereafter, file with the auditor a bond, in the amount so fixed,

with at least two sufficient sureties, to be approved by the auditor, conditioned to pay all the costs made on the appeal in case the appellant fail to sustain the same, or the appeal be dismissed for any cause; and the auditor shall make a complete transcript of the proceedings had before the commissioners, and certify the same, together with all original papers filed in his office, and transmit them to the probate judge of the county within twenty days from the day of the final hearing. [68 v. 60, §§ 5, 12; 73 v. 181, § 13.]

1. 8 O. S. 333; 37 O. S. 508. The facts being ascertained, the question whether or not a ditch will conduce to the public health convenience or welfare within the meaning of § 4511, so that it will be of public use, is a question of law; and the mere fact that larger and better crops may be raised on two farms sought to be drained does not authorize the establishment of the ditch, 42 O. S. 202.

3. Law not making provision for compensation unconstitutional, 21 O. S. 667; 10 Bull 276, 434; 11 Bull 18; but not where damages are waived, 36 O. S. 639, 642.

Unless the appeal bond is filed within the required time, the appellate court has no jurisdiction, 22 O. S. 268. Error does not lie until common pleas makes a final order, 30 O. S. 58. Presumption that complete record would show the existence of all necessary jurisdictional facts, 28 O. S. 619. Commissioner owning land crossed by ditch not disqualified, 41 O. S. 399. Consolidation of appeals. *Id.*

§ 4464. Hearing of preliminary questions in probate court. The probate judge shall file the transcript and the original papers, and docket the case, and the appellant shall be plaintiff therein, and the county commissioners and petitioner defendants, and the case shall be so styled, and thereupon he shall fix a day, not exceeding five days thereafter, for the hearing of all preliminary motions, and the examinations of the papers so filed; on the day so fixed all preliminary motions shall be heard and determined, as well as all questions arising upon the record, and if he finds that the proceedings are irregular in substance, or that the appeal has not been perfected according to law, he shall dismiss the appeal at the cost of the appellant, and certify such dismissal, with his findings thereon, back to the commissioners; but the judge may, in his discretion, order and allow the correction of any technical defect, error or omission in such proceedings. [78 v. 205.]

§ 4465. **When jury to be drawn—venire.** If the probate judge find that the appeal is perfected, he shall thereupon fix a day, not more than ten days from that date, for the trial of the case as appealed by jury, and he shall immediately notify the clerk of the court of common pleas and the sheriff of the county, to meet at the clerk's office, and the clerk and sheriff shall proceed at once, in the clerk's office, to draw from the jury box the names of sixteen jurors; and the clerk shall make a list of the names so drawn, in the order in which they were drawn, and certify the same to the probate judge, who shall issue a venire, commanding them to appear on the day set for trial, at the hour of eight o'clock A. M., and deliver the same to the sheriff, who shall serve the same within five days thereafter, and return the same on or before the day set for trial. [72 v. 30, § 7.]

§ 4466. **How panel to be filled.** On the trial the probate judge shall take the list of jurymen as furnished by the clerk, and call each name in the order in which it appears on the list, until twelve answer, when each shall be required to answer as to his qualifications as a juror; if any juror be challenged for cause, and be excused by the court, the next on the list shall be called, until the panel is full, when the plaintiffs shall have two and the defendants two peremptory challenges; and if the panel be not filled by the jurymen whose names appear on the list, the sheriff shall fill the panel from among the bystanders who have the proper qualifications. [72 v. 30, § 7.]

§ 4467. **How jury to be sworn.** The probate judge shall administer to the jurors an oath, faithfully, impartially, and to the best of their ability, and from actual view of the premises along the whole route of the improvement, to examine and determine the particular matters appealed from, and to render a true verdict according to the facts appearing to them from actual view of the premises, and the evidence, under the charge of the court. [72 v. 30, § 7.]

§ 4468. **View by and trial by jury.** The sheriff, or his deputy together with the surveyor or engineer who surveyed, leveled, apportioned and platted the

improvement, may accompany the jury, and point out its route; no other person shall be permitted to interfere in any way with the jurors in the discharge of their duty; and after the jury has fully examined the premises, and returned to court, either party may be heard, in person or by counsel, and may offer evidence to the jury, under the direction of the court, upon any matter given it specially in charge. [72 v. 30, § 7.]

§ 4469. Form of the verdict. The jury shall find and return a verdict determining the matter or matters appealed from, being one or more of the following propositions, viz:

1. Whether said ditch will be conducive to the public health, convenience or welfare.
2. Whether the route thereof is practicable.
3. The compensation due each appellant for land appropriated.
4. The damages due each appellant for property affected by the improvement.

The jury shall return their verdict in writing, signed by the jurors; as to said first and second propositions, it shall be necessary for only eight jurors to agree; as to the third and fourth all must agree, and the jury may be polled as in other cases. [72 v. 30, §§ 7, 9.]

Findings of commissioners must be for or against the whole, and not merely a part, 28 O. S. 434. Where on appeal from such decision to the probate court the jury report that they have carefully examined the ditch and find that to locate and establish a certain part of it which they describe in their report would not be conducive to the public health and welfare, the finding is not a compliance with the statute and is insufficient and should have been set aside by the court on a motion filed for that purpose, *Id.* In such case the probate court has power to set the imperfect report aside and impanel a jury anew, *Id.*

§ 4470. Transcript to be sent to county commissioners.
Taxation of costs. The probate judge shall receive the verdict of the jury, and make a record thereof together with all the proceedings before him, and shall thereupon tax the costs in favor of the prevailing party, and against the losing party; if more than one matter is appealed from and a party prevails as to one, and loses as to another, the court

shall determine how much of the costs such party shall pay; but the costs on motions, continuances, and the like shall be taxed, and paid as the court may direct. If there are several parties, upon the side taxed with costs, the court shall apportion the costs equitably between them. Said judge shall immediately after the trial, make a transcript thereof, certify and transmit the same, together with all the papers in the case, with the bill of costs made in the probate court, to the auditor of the county, who shall thereupon notify the commissioners to meet at the auditor's office, within five days from the date of the notice to determine the matters growing out of the appeal and verdict. [78 v. 206.]

§ 4471. Repealed. [78 v. 204, 210.]

§ 4472. **Costs when jury find for improvement.** If the jury find that the improvement is necessary, and the same will be conducive to the public health, convenience or welfare, and is practicable, the commissioners shall apportion the compensation and damages as directed in § 4461. They shall also assess and apportion the costs as directed by the probate court, and order the auditor to place the same on the duplicate to be collected as other taxes, and may in addition thereto, sue upon the bond given for the payment of costs, and execution may be sued out of the probate court for the collection of any costs taxed against any party, as is provided in § 4470. Any costs taxed against the commissioners shall be paid out of the general county ditch fund. [81 v. 50; 78 v. 206.]

Since 10 Bull 276; 11 Bull 18; holding the law unconstitutional because no provision was made for compensation, the sections have been amended.

§ 4473. **Costs when probate court confirms assessment.** If by the final decision in the probate court, any claimant of compensation and damages do not obtain a greater sum than was allowed and awarded to him by the order of the commissioners from which he appealed, he shall pay all costs created by his appeal so far as the court can ascertain the same. And the commissioners shall assess and apportion the compensation and damages found by the jury, as directed

in § 4461, and the commissioners shall assess and apportion the costs as directed by the probate court, which shall be collected and paid as directed and provided in § 4472. [81 v. 50; 78 v. 206.]

§ 4474. Several appeals may be tried together. If more than one party appeal, the probate judge shall order the cases to be consolidated and tried together, and the rights of each party, as to compensation or damages shall be separately determined by the jury in its verdict.

§ 4506. Fees of probate judge. Jurors. Witnesses, etc. For docketing each case, for each party, .05.

For issue of venire, with seal, 50.

For each subpoena with only one name, .05; and for each additional name therein, .03.

For each journal entry, per hundred words, .06.

For copies duly certified, including seal, per hundred words, .06.

For swearing each witness, .05.

Certifying each witness, .03.

Entering attendance of each witness, .03.

For swearing jury, .15.

Taking affidavits, .15.

For filing each paper originally filed in probate court, and including transcript, .03.

For issuing transcript of proceedings in probate court, per hundred words, including certificate and seal, .06.

For certifying fees to auditor, for each person named, including jurors, 03.

And for all items not herein specified, the same fees as are allowed by law for like services in other cases.

Sheriff's fees. The sheriff, for serving and returning each summons, when only one defendant is named therein, .35.

And for each additional name, .20.

For copy of summons, duly certified, .45.

For serving and returning a subpoena, for each person named therein, .15.

For serving and returning venire for jury, traveling fees included, to be paid by the county, \$4.00

And for calling each talesman to fill the panel, .15.

For each day's attendance with the jury on the line of the ditch, \$3.00, and for all other services required to be rendered by him the same fees as are allowed by law for like services in other cases.

The jurors shall each receive, for each day's attendance, \$1.50, and .10 per mile from his place of residence to the county seat.

Witnesses, duly subpoenaed and in attendance, either before the commissioners, the auditor, or the probate court and jury, for each day's attendance, .75 each, and .05 per mile from place of residence to county seat.

The surveyor or engineer, \$4.00 per day for the time actually employed on the work designated for him to do.

How paid. The fees are paid out of the county treasury when the bill of items is examined and allowed by the commissioners, and the auditor shall issue orders therefor on such allowance, § 4507.

Appeals in proceedings to open and widen, etc., outlets of ditches are taken and prosecuted in the same manner as in county ditch cases. [80 v. 209-212.]

APPEALS IN TOWNSHIP DITCH CASES.

§ 4533. Appeals to the probate court. Bond. Any person interested in the location of such ditch, or in the amount of compensation and damages determined upon by the trustees, may take an appeal from the proceedings of the trustees to the probate court of the county, by giving written notice thereof to the clerk of such township within eight days after the decision of the trustees, and by filing with the clerk a bond, with two or more sufficient sureties, conditioned for the payment of all costs made upon such appeal in case the decision of the trustees shall be sustained in the probate court; which bond shall be made to the acceptance of the township clerk and the probate judge of such county, indorsed on the same, and filed by the probate judge with the other papers in the case; and such clerk shall thereupon, at the request of each person so appealing, his agent or attorney, make and deliver to each such person, his agent or

attorney, a full and complete certified transcript of the proceedings had in the case, which shall be filed with the probate judge of such county within ten days from the filing of such bond. [71 v. 124, § 15.]

The appeal must be perfected within the time limited by law, otherwise the appellate court has no jurisdiction, 22 O. S. 268

§ 4534. **Consolidation of separate appeals, etc.** When two or more persons have taken an appeal, according to the preceding section, the probate judge shall order the consolidation of such cases, and the rights of all parties interested shall be determined by the jury in the one case thus consolidated, and any one of the appellants may give the notice required in the preceding section; and the probate judge, upon the filing of such bond and transcript, shall issue a notice and deliver the same to the appellants, returnable on a day therein named not beyond fifteen days, which shall specify the time of meeting of the parties before the court, for the purpose of hearing and determining all preliminary questions pertaining to the case. [72 v. 30, §§ 15, 16.]

§ 4535. **Notice to land owners.** The appellants shall serve the notice by copy on all persons interested in the location of the ditch residing within the county, and if any person so interested reside out of the county, or can not be served by a copy of the notice, the appellants shall cause such notice to be published for three consecutive weeks in some newspaper of general circulation in the county, and proof of such publication shall be filed in the probate court together with proof of the service of such notice on all persons interested as aforesaid, at least three days before the time fixed for impaneling the jury. [72 v. 30, § 16.]

§ 4536. **Hearing of preliminary matters on appeal.** At the time specified in the notice, the probate judge shall hear and determine all preliminary questions pertaining to the case, and if he find that the appeal has not been perfected according to this chapter, he shall dismiss the appeal at the cost of the appellant, and certify such dismissal to the trustees of the township, who shall thereupon proceed as if no appeal had been taken; but the judge may, in

his discretion, order and allow the correction of any technical defect, error or omission in making such appeal. [73 v. 11, § 17.]

The probate court has no authority to review the proceedings of the trustees for supposed errors or irregularities, 2 C. C. R. 482.

§ 4537. **Trial to jury.** If the judge find the preliminary proceedings for appeal in substantial conformity with the provisions of this chapter, he shall select a jury of twelve disinterested freeholders of the county, not resident of such township, who shall constitute a jury for such case, and shall issue, over his hand and seal of office, a notice of such selection, directed to the sheriff of such county, returnable on a day therein named not beyond forty days, which notice shall specify the time of meeting of the jury in the court; if any of the jurors fail to attend, or for good cause be excused from serving, or be set aside on account of a challenge, the panel shall be filled with talesmen as in jury cases in the courts of common pleas; the plaintiffs shall be entitled to two and the defendants two peremptory challenges, and may make any number of challenges for the causes for which challenges are allowed in the court of common pleas; and in respect to challenges, the appellants shall be considered one party, and the petitioners as the other, and the jury shall be sworn to try all the claims which are represented by the appellants, if there be more than one. [73 v. 11, § 17.]

§ 4538. **Jury shall view the premises.** The jury shall then, under the care of the sheriff or deputy sheriff, and with such person or persons as the court may appoint to show them the premises, and before any testimony shall be given, except the plat and field notes of the ditch, if there be any, and the title papers of the claimants, if produced, which in that case they shall take with them, proceed to examine the ditch, as established or ordered, and the property of the several claimants taken therefor, or alleged to be injured thereby, and after making such examination, shall return to the court at the time the court shall have appointed, whereupon the trial before the

jury shall proceed in the same manner as other jury trials in said court. [73 v. 11, § 17.]

1 C. C. R. 130, 137, 138. The jury are to determine whether the ditch *as ordered by the trustees* will conduce to the public health, convenience and welfare, and the compensation and damages resulting from the establishment of the ditch thus ordered, 2 C. C. R. 482.

§ 4539. **The form of the verdict.** The jury shall render a verdict in writing, and shall find therein: first, whether it will be conducive to the public health, convenience, or welfare, to cause the proposed ditch to be established or located; second, the amount of compensation due each person claiming compensation in case of the location of the same, which shall be computed without deduction for benefits to any property of such person; third, the amount of damages resulting to all parties claiming the same; and the judge is authorized to adjourn the proceedings in the premises from time to time, as circumstances may require. [73 v. 11, § 17.]

§ 4540. **Proceedings on the return of the verdict.** Upon the return of the jury, the judge shall make a record of all the proceedings had in the case before him, and shall also make such order as to the payment of compensation for land used, or damages sustained, as the jury shall report; and shall also tax such costs in the proceeding, as are provided by law in similar cases, and issue execution therefor. [71 v. 124, § 18.]

§ 4541. **Fees and costs and to whom taxed.** If the report of the jury be not in favor of the appellant, all costs made on such proceedings in the court shall be taxed to and paid by such appellant, and collected as judgments at law in other cases; but if two or more persons have appealed, and the report of the jury be favorable to some of the appellants, and against the other appellants, the judge shall apportion the costs equitably among all the appellants, except those in whose favor the report of the jury is made; and the jurors shall be allowed one dollar and fifty cents per day each, together with mileage from their respective residences to the probate court, at the rate of five cents per mile. [71 v. 124, § 18.]

§ 4542. Judge to make transcript and transmit it to township clerk. The probate judge shall make a transcript of all the proceedings had before him in the case, and transmit the same, together with all the files and papers in the case to the clerk of the township; and the township clerk shall notify the trustees to meet at his office, at a time to be fixed by him, and within five days from the date of the notice, to determine the matters growing out of the appeal and verdict, and to secure the construction of the ditch in the manner provided in this chapter when no appeal is taken.

Appeal from township trustees in proceedings to open, widen, etc., outlets to ditches, etc.—An appeal may be taken in proceedings by township trustees to cause to be opened, enlarged, widened, altered, deepened and walled up and protected any sink hole or fissure, break or opening in the rock thereof in their respective townships, that may be used as the outlet from any ditch, drain or watercourse, 80 v. 206, 209.

MISCELLANEOUS DITCH CASES.—*Compensation.*—For land appropriated for township ditch, the land owner is entitled to full compensation and is also entitled to damages to his other lands from which the appropriation is made, 1 C. C. R. 130. He is not entitled to have awarded him as part of his compensation the *value* of a strip of land not actually appropriated on each side of the ditch; nor is he entitled to have the costs of constructing such portion of the ditch as the trustees apportion to him assessed as part of his damages, *Id.*

Costs.—Enjoining apportionment of on lands not benefitted, 1 C. C. R. 251.

Error.—Final orders of township trustees establishing ditches, etc., reviewable by petition in error. Injunction restraining construction of ditch not the appropriate remedy, 19 Bull 263; 45 O. S.

Evidence.—It is not error to the prejudice of land owner on trial of claim for compensation and damages to permit against his objection a properly qualified witness to be asked "what injury as matter of fact the ditch would cause to the lands?" to which the witness answered "none," 1 C. C. R. 130.

Jurors.—Findings must be unanimous, 36 O. S. 639, 65 v. 155. Jury may be impaneled by probate court when case remanded, 28 O. S. 619.

Necessity.—Decision of county commissioners final as to, 25 O. S. 425; 20 O. S. 496. Under § 4520 (81 v. 81,) trustees should make a finding that ditch is "necessary" as well as that it is "conducive to the public health, etc.," 2 C. C. R. 10. The record of the proceedings should show such finding, and where no tax or assessment has been ordered to be levied or assessed, the want of such finding can not be supplied by parol proof, *Id.*

Notice.—Personal to owner not indispensable, 19 O. S. 173. Finding of commissioners sufficient proof of, 31 O. S. 561. Notice to railroad company by service on local agent not valid, 2 C. C. R. 10. See § 6414, *nn.*

Parties.—Receiver of railroad company competent party plaintiff in suit to restrain ditch proceedings against company commenced and prosecuted after his appointment, 2 C. C. R. 10.

Petition to clean ditch does not give power to make a new ditch or deepen and widen one already constructed, 1 C. C. R. 73.

Powers of township trustees in establishing ditches can not exceed the limitations of the statutes, 1 C. C. R. 566. Power to locate additional ditches, 1 C. C. R. 130.

Re-trial.—Power of probate court to grant, 26 O. S. 434.

PROCEEDINGS ON APPEAL IN REMOVAL OF DRIFTS.

§ 4575. **Notice of appeal and bond.** Any person interested in such improvement may, after the same is ordered, take an appeal from the proceedings of the commissioners to the probate court of the proper county, by giving written notice thereof to the auditor of such county within five days after the decision of the commissioners, and by filing with the auditor a bond with two or more sufficient sureties, conditioned to pay all costs made upon the appeal, in case the decision of the commissioners be sustained in the probate court, which bond shall be made to the acceptance of the county auditor and the probate judge of the county, indorsed on the same, and filed by the probate judge with the other papers in the case; and when two or more persons take an appeal, the probate judge shall order the consolidation of such cases into one case, and the rights of all parties in interest shall be investigated by the jury in the one case thus consolidated. [74 v. 22, §§ 7, 8.]

§ 4576. **Transcript and filing thereof.** The county auditor shall, at the request of a person so appealing, his agent or attorney, make and deliver to such person, his agent or attorney, a full and complete transcript, duly certified, of the proceedings had in the case, which transcript shall be filed with the probate judge of the county within ten days from the filing of such bond. [74 v. 22, § 7.]

§ 4577. **Drawing the jury and venire.** The probate judge, upon the filing of such bond and transcript, shall cause to be drawn from the jury box, as provided by law in other cases, a jury of twelve disinterested free-holders of the county, who shall constitute a jury for such case, and shall issue a venire, directed

to the sheriff of such county, returnable on a day therein named, not exceeding thirty days, which shall specify the time of meeting of the jury in the probate court. [74 v. 22, § 8.]

§ 4578. **Notice of the meeting of the jury.** The applicant shall notify all persons interested in the improvement, of the time fixed by the probate court for the meeting of the jury, and if any person interested in the improvement reside out of the state, or can not be served in writing with such notice, the judge, being notified of the fact, shall cause such notice to be published for three successive weeks in some newspaper printed and of general circulation in the county; and proof of the publication of such notice shall be filed with the probate court before the impaneling of the jury, together with the proof of the service of such notice in writing on all persons interested, as aforesaid at or before the time so specified. [74 v. 22, § 8.]

§ 4579. **Hearing of preliminary matters.** At the time specified in the notice, the probate judge shall hear and determine all preliminary questions, and if he find that the proceedings in appeal have not been perfected, he shall dismiss the appeal at the costs of the appellant, and certify such dismissal to the commissioners of the county, who thereupon shall proceed as if no appeal had been taken; but the judge may, in his discretion, order and allow the correction of any technical defect, error or omission in making such appeal. [74 v. 22, § 9.]

§ 4580. **Oath and report of the jury.** The judge shall administer an oath to the jury faithfully and impartially, and upon actual view, if so required by either party, to determine whether such improvement will be conducive to the public health, convenience, or welfare, and the jury shall file a report with the judge within five days after taking such oath, unless he, for good cause shown, shall allow further time. [74 v. 22, § 9.]

§ 4581. **Proceedings on report of jury.** Upon the return of the jury the probate judge shall make a record of all the proceedings had in the case before him, and shall also make such order as to payment of

costs as are provided by law in similar cases, which costs, together with those made before the commissioners, shall be divided, to be paid in fair proportion among the appellants, in conformity to the report of the jury; but if the report of the jury shall not be in favor of the appellant, all costs made on such proceeding in the probate court shall be taxed to and paid by such appellant, and collected as judgments at law in other cases; but if two or more persons have appealed, and the report of the jury be for some and against the other appellants, the probate judge shall apportion the costs equitably among all the appellants, except those in whose favor the report of the jury is made; and the jurors shall be allowed two dollars each per day, together with mileage, as in other cases. [74 v. 22, § 10.]

PROCEEDINGS IN RELATION TO THE CONSTRUCTION OF
LEVEES.

§ 4585. Probate court may order construction of levees. The probate court of any county may, whenever found to be conducive to the public health, convenience, or welfare, cause to be located, established, and constructed, as hereinafter provided, a levee along any stream or water-course of any kind within the county, for the protection of land from overflow. [73 v. 88, § 1.]

§ 4586. Petition therefor. What to contain. Bond. When there is filed in the office of probate judge a petition, signed by one or more persons owning, controlling, or occupying lands adjacent to, or who shall be interested in, the proposed levee, setting forth the necessity for the same, with a substantial description of the proposed starting point, route, and terminus, and a bond, with good and sufficient surety to the approval of the judge, payable to the state, conditioned to pay all proper costs and expenses in such proceedings, in case the levee be not finally ordered, the probate judge shall fix a time for hearing the petition, not more than thirty days from the time of filing the same. [73 v. 88, § 2.]

§ 4587. Notice to parties interested. The judge, or

one of the petitioners, shall cause a notice in writing to be given, at least ten days before the day set for hearing the petition, to the owner of each tract of land, and to the auditor of any county and the clerk of any township which may be affected by the proceeding, of the filing and pendency of the petition, and the time the same will be for hearing before the court; and if any person owning lands which may be affected by the proceeding is a non-resident of the county, or if such owner is a turnpike or railroad company, such notice may be given by publication for two consecutive weeks, in some newspaper of general circulation in the county; but if such railroad company has a principal office, or a regular ticket or freight agent in the county, a notice, if required by the judge, may be served by leaving a copy thereof with the principal officer in charge of such office, or with such ticket or freight agent, in which case notice to such railroad company need not be given by publication. [73 v. 88, § 2.]

§ 4588. **Application for damages.** An owner claiming compensation for lands appropriated for the purpose of constructing any such levee, shall make an application in writing therefor to the court, on or before the day appointed for hearing the petition, and on failure to make such application, such owner shall be deemed and held to have waived all right to such compensation. [73 v. 88, § 3.]

§ 4589. **Hearing on preliminary matters.** On the day set for the hearing, if it appear to the court that any person or corporation interested in the levee or embankment has not been notified as required by this chapter, or that any requisite preliminary steps have not been taken, the court shall continue the case not exceeding twenty days, and order such notice to be given or such other preliminary steps to be taken; and the court shall have power at any time before the final order has been made to continue the case and order notice to be served, as required in § 4587, upon any owner of lands who may be found to be affected by said proceeding, and who has not been served with such notice; and if notice

is given after the time originally appointed for the hearing of the petition, the petition shall be regarded, as to such owner so notified, as appointed for hearing on the day to which the case is continued for the purpose of giving such notice. [73 v. 88, § 4.]

§ 4590. **Hearing on the merits and proceedings thereon.** When the court finds that notice of the filing and pendency of the petition has been given, and all other preliminary steps taken, it shall proceed to hear and determine the petition upon the papers and evidence; and if the court is satisfied that the levee will be conducive to the public health, convenience, or welfare, it shall forthwith appoint three competent, disinterested freeholders of the county, who shall be sworn to faithfully and impartially perform their duty as such viewers, and they, with the aid of a competent engineer, who shall be appointed at the same time by the court, shall proceed to view the premises along the proposed route, and the lands to be affected by the proposed levee, and make a report of their proceedings in writing to the court within fifteen days from the date of their appointment, unless in the discretion of the court, a longer time shall be given them; which report shall show whether in their opinion the construction of the levee, substantially on the route petitioned for, will be conducive to the public health, convenience, or welfare, what owners of land should assist in the construction of the proposed levee, and in defraying the costs and expenses thereof, and the lots or lands, and the quantity thereof, which will be benefitted by such levee, and if the court, in its discretion, deem it necessary, it may order the engineer to make and return, at the same time the viewers make their report, maps, plats, and profiles of the proposed levee and the lands which may be affected by the same. [73 v. 88, § 5.]

§ 4591. **Hearing of application for damages.** If the viewers report in favor of the construction of the levee, the court shall appoint a day, not later than ten days from the filing of the report, when it will

hear and determine all applications for compensation for lands appropriated, and the necessity for the levee; and in addition to the petition, report of viewers, maps, plats, and profiles of the engineer, the court may hear further evidence and arguments of counsel for or against the construction of such levee; and the judge shall have the right to view the premises before the final order is made, and the court, if found necessary, shall have the right to continue the hearing of the case from time to time, in its discretion. [73 v. 88, § 5.]

§ 4592. Compensation must be paid before final order. No final order for the construction of such levee, or any part thereof, shall be made until the full amount of compensation for land appropriated has been paid. [73 v. 88, § 6.]

§ 4593. The final order. If, upon the final hearing of the case, the court finds that the levee ought to be constructed, and is necessary and will be conducive to the public health, convenience, or welfare, it shall order the same to be located, established and constructed; and it shall also order and prescribe the site of such levee, and shall direct the engineer to finally locate, level, and measure the same and divide it into suitable sections, not less in number than the number of owners of land benefitted by its construction, and shall prescribe the time within which the work upon each section shall be completed, and by whom paid for. [73 v. 88, § 7.]

§ 4594. How assessments of work to be made. A person owning lands abutting on or over which such levee shall pass, shall have his section assigned thereon, within or along the boundary of his lands, to the extent of the assessment made against such owner, when the frontage is sufficient, otherwise the same shall be thus assessed as far as practicable; and in determining the number of owners, tenants in common, and the owners of a life estate in any tract of land with tenants in common, may be counted as one, and the court may, in its discretion, order such tenants in common, and such owners of a life estate, to pay for the work on a single section jointly, in

proportion to the value of their respective interests. [73 v. 88, § 7.]

§ 4595. **Costs and statements for parties.** The court shall allow and assess all the reasonable fees, costs, and expenses of locating and establishing such levee, and shall apportion the payment of the same equitably among the parties to be benefitted thereby, and prescribe the time within which the assessment shall be paid, and render judgment therefor, to be collected as other judgments; and the judge shall, if requested, prepare for the use of the party making the request a brief statement in writing, describing briefly his apportionment of the levee, together with the length, height, width, and slope of the same, the amount of costs assessed against such party, and the expenses of performing the work apportioned to such party, when to be paid, and by what time the work shall be completed. [73 v. 88, § 8.]

§ 4596. **Meaning of the word "levee," in this chapter.** The word "levee," in this chapter, shall be understood to embrace and include, with or without being specially mentioned in the petition for a main levee, any side, lateral, or spur levee, or levees necessary to be constructed to secure the objects and purposes for which any main levee may be made. [73 v. 88, § 9.]

§ 4597. **Changes in route authorized.** The court may, in making the final order, on the recommendation of the viewers and engineer, or of the jury, alter or change the termini and route of a proposed levee, from that set forth in the petition, so as more effectually to secure the objects and purposes of the original petition, if the compensation for lands appropriated is not affected thereby. [73 v. 88, § 10.]

§ 4598. **When another viewer or engineer appointed.** If a viewer or the engineer die, resign, or refuse, or neglect to perform the duties required of him, the court shall forthwith appoint an eligible person to fill his place, who shall qualify and perform the duties the same as if originally appointed. [73 v. 88, § 11.]

§ 4599. **When riprapping to be done.** If it be found

necessary by the court to protect such levee from being washed away by high waters or freshets, that any portion of the same should be riprapped or otherwise protected by stone or timber, in its final order, it may direct additional work to be done, particularly describing its kind and character, and the particular place and the sections on which the same shall be done. [73 v. 88, § 12]

§ 4600. **The jury and venire.** If at any time set for hearing the petition any party in interest demand a jury, the probate judge shall select and impanel a jury of twelve disinterested freeholders of the county, who shall constitute a jury for the case, in which case no viewers shall be appointed, and the probate judge shall issue a venire for such jury, directed to the sheriff of the county, returnable at a day therein named, not exceeding twenty days, which venire shall specify the time of meeting of the jury in said court; and the rights of all the parties in interest shall be investigated in one case and by one jury. [73 v. 88, § 13.]

§ 4601. **Impaneling jury and form of verdict.** At the time fixed for the meeting of the jury, any party interested may challege any juror for cause, and the court shall hear and determine all further preliminary questions pertaining to the case, and may direct the sheriff of the county to fill any vacancies which may then be in the panel arising from any cause; and the judge shall thereupon administer an oath to the jurors, faithfully and impartially to try the issues submitted to them in the case, and a true verdict render according to the law and evidence, and the jury shall in their verdict report in writing to the court:

1.—Whether the proposed levee will be conducive to the public health, convenience, or welfare.

2.—The amount of compensation each person claiming compensation for lands appropriated for the construction of the proposed levee, is entitled to in case the same is located.

3.—What owners of lands should assist in the construction of the proposed levee, and in defraying the costs and expenses thereof, and the lots and lands,

and the quantity thereof which will be benefitted by such levee, specifying the sections and work to be done and by whom to be paid for, as provided in this chapter. [73 v. 88, § 14.]

§ 4602. **Trial to the jury.** The jurors may, in the discretion of the court, before making up their verdict, be ordered to view the premises along the route of the proposed levee, and the court shall direct the engineer to make, return, and lay before the jury, the necessary maps, plats, and profiles of the proposed levee and the lands which may be affected by the same; the parties in interest may offer evidence, and may be heard in person and by counsel before the jury, and the jury shall be subject to the judicial direction of the court in the hearing of the case and in making up its findings or verdict, and shall return a verdict within ten days after being sworn, unless the court, for good cause allow further time; and it is authorized to adjourn the proceedings in the premises as the circumstances of the case may require. [73 v. 88, § 15.]

§ 4603 **Proceedings on the verdict.** Upon the return of the verdict and report of the jury, the court shall receive the same, if found regular and in accordance with law, and thereupon discharge the jury, but if not found regular and in accordance with law, he shall recommit the case to the jury with proper instructions, to return the same in conformity with the law; and after the jury have returned their verdict and reported according to law, they shall be discharged, and the court shall proceed to confirm the verdict and report, if found to be favorable to the construction of the proposed levee, and shall also make an order for the payment of compensation, as found by the jury, for lands appropriated, and also for the performance of such things as the jury shall find in their verdict; and the court shall also make and enforce such further orders in the premises as are prescribed in §§ 4593, 4594, and 4595, and all such orders as may be necessary to the complete accomplishment of the objects and purposes of this chapter. [73 v. 88, § 16.]

§ 4604. Fees and costs. Jurors and viewers shall each be allowed pay at the rate of one dollar and fifty cents per day, and mileage at five cents per mile from their residence to the office of the probate judge, and from there to the place of the location of the proposed levee, in case of a view; and the engineer shall be allowed, not to exceed five dollars per day, while actually employed, and all other costs and expenses shall be taxed as is provided by law in similar cases, and all costs and expenses of the probate judge shall be collected and retained by him but not in excess of those allowed by any other law. [73 v. 88, § 17.]

§ 4605. Court may correct errors, etc. The probate court shall have power to correct any irregularities or clerical errors or mistakes in the report of the viewers, or in the verdict of the jury in relation to the lots and lands, and the quantity and the ownership thereof, if the levee shall be ordered to be constructed, and upon a final order being made for the construction of the proposed levee, the judge shall make a record of the proceedings had in the case; and the court may, after final order extend the time for the completion of the work on any section of the proposed levee, if deemed necessary. [73 v. 88, § 18.]

§ 4606. When proceedings to be dismissed. If the viewers or the jury report against the construction of the levee, or if the court at any stage of the proceedings before the final order is made, find that such levee should not be constructed, the court shall dismiss the proceedings at the costs of the petitioners, who shall be bound jointly, for the costs and expenses, with the principal or principals on the bond given, as provided in § 4586. [73 v. 88, § 19.]

§ 4607. Repair of levees. When it becomes necessary to repair any levee constructed under the provisions of this chapter, or under any other law, the same shall be done under this chapter, and the proceedings therefor shall conform as far as possible to proceedings for the original location of a levee. [73 v. 83, § 20.]

§ 4608. When levee intersects watercourse or another levee. If the route of any proposed levee extend along any natural stream or watercourse and over, including or connected with the line of any levee already constructed or partly constructed, the parties interested shall be entitled to have the amount of work and expense they have already been to in the construction of such levee, taken into account in determining the question of what further work and expense, if any, they shall be required to pay for, in the construction of the proposed levee. [73 v. 88, § 21.]

§ 4609. Proceedings when levee benefits a road. When any levee established under this chapter affects beneficially any public or incorporated turnpike road or railroad so that the road bed or track on any such road will be made better or safer by the construction of the levee, there may be apportioned to the county, if a county, state, or free turnpike road, to the township, if a township road, and to the company, if a corporate turnpike road or railroad, such portion of the work, costs, and expenses thereof, as if they were private individuals, and the court shall require them to pay for such work and pay such costs and expenses in like manner as individuals, except that when a county or township is ordered to pay for any such work and pay such costs and expenses, the commissioners of the county and the trustees of the township are required to pay for such work and such costs and expenses from the general fund of the county, or township. [73 v. 88, § 22.]

§ 4610. The sale of the work. The levee shall be constructed and compensation paid within the time specified in the order of the court, and upon the making of the final order, the judge shall immediately give notice of the sale of such work by sections, or parts of sections, to the lowest bidder, by printed or written handbills; the time of sale shall not be less than ten nor more than twenty days from the date of the notice, and the place shall be either at the door of the court house, or at either terminus of the

levee, as the judge may direct; and he shall take such security for the performance of such work and for the payment of all damages to the parties interested in case the same is not completed within the time and in the manner prescribed, as he may deem necessary, and he shall, immediately after such sale, enter his proceedings on his journal and make them a part of the record in the case; and he shall, in case of a sale of the work to the person who is ordered to pay for the same, only take the bond as aforesaid. [73 v. 88, § 24.]

§ 4611. **When assessment to go on duplicate.** In all other cases the judge shall fix the time within which the parties who have been ordered to pay for the work so sold, shall pay into the court their portion of the work at the price so sold, and in case the same is not paid by the time so fixed he shall certify to the county auditor the several amounts, including costs and expenses apportioned so assessed against each owner or person interested as aforesaid, not before paid, describing each piece or parcel of land so to be charged; and the auditor shall thereupon enter the same on the duplicate to be collected as other taxes, and when collected the same shall be paid over to the persons entitled thereto, upon the order of the probate judge, whenever he shall be satisfied that the several sections have been completed according to the order of the court before made; in case of a failure to sell any portion of the work at any lettings, and in case any purchaser at any letting fails to give bond or complete any part of the work as required, the judge shall proceed to again let the same and make all necessary orders in relation thereto as prescribed in this section. [73 v. 88, § 24.]

§ 4612. **No person may complain of error unless materially affected.** No person shall be permitted to take advantage of any error committed in any proceeding to locate, establish, and construct, or repair a levee under the provisions of this chapter, nor of any error committed by the probate judge or probate court, the viewers, or the jury in the case, or by the

engineer or other person, in such proceedings, nor of any informality, error, or defect appearing in the record of the proceedings, nor of want of notice to the owner of any lands affected thereby, unless the party complaining is first shown to be materially and substantially affected thereby. [73 v. 88, § 25.]

§ 4613. **Relief in case of manifest error.** But the court in which any action may be brought to enjoin, reverse, or declare void the proceedings by which any such levee is ordered to be located, established, constructed, or repaired, or to enjoin the performance of any work, or the assessment or collection of any costs and expenses ordered by the probate court for the purposes aforesaid, may, if there be manifest error in such proceedings affecting materially the substantial rights of any plaintiff, in such action, set the same aside as to such plaintiff without affecting the rights or liabilities of the other parties in interest; and the court shall, on the final hearing, make such order in the premises as may seem equitable and just, and may order the work done, and the costs and expenses paid, by the plaintiff, or the amount of money returned to the auditor of the county against the plaintiff, or any part thereof, to remain on the duplicate for collection, or may perpetually enjoin the same or any part thereof; the costs of such action, and of the proceedings had therein shall be apportioned among the parties, or paid out of the county treasury, in whole or in part, as justice and equity may require and the court direct. [73 v. 88, § 25.]

§ 4614. **When and how township trustees may establish levees.** The trustees of any township through which a stream or river subject to overflow passes may, on application of any party, enter upon any land in their township, to view any proposed levee or embankment, for the purpose of protecting any land held by more than one person, and cause such levee or embankment to be located and constructed, whenever, in their opinion, the same is demanded by or will be conducive to the public health, convenience, or welfare; and they may appropriate private

property, according to the provisions of law relating to the appropriation of private property to the use of corporations; but before any proceedings shall be taken by the trustees under this section, the expenses and cost of location and construction, and all other costs and expenses necessary or incident to the location or construction of the proposed levee, shall be guaranteed or paid to the trustees by the parties, or some of them, interested in the construction of the levee. [57 v. 88, §§ 1, 2.]

PROCEEDINGS ON APPEAL IN STATE ROAD CASE.

§ 4627. **Notice of appeal and bond.** An appeal from the final decision of the commissioners, on any application for damages or compensation sustained by the location of any state road, shall be allowed to the probate court of the proper county, if notice of such appeal be given by the appellant during the same session of the commissioners at which such decision was made, and the appellant shall, within ten days thereafter, enter into bond with good and sufficient surety, to be approved by the county auditor, for the payment of all costs and expenses arising from, or in consequence of, such appeal; and the appellant shall, within five days thereafter, deliver to the probate judge a transcript of the proceedings had before the commissioners. [51 v. 388, § 12.]

§ 4628. **Summons.** The jury and its proceedings. Upon receiving the transcript, the judge shall immediately issue a summons against the obligors in the bond filed under § 4618, which shall be served and returned as other writs of like character; in such suit the appellant shall be plaintiff and the obligors defendants; and upon the return of service, the judge shall cause a jury of twelve men to be selected and returned by the sheriff and clerk as provided by law, and such proceedings and trial may be had before the jury as are provided in chapter four; (1) and upon return of their verdict to the probate judge, he shall enter the same on record, with the former proceedings, and

certify the decision to the county auditor, and the decision made and recorded shall be final, except as hereinafter provided. [51 v. 388, § 12.]

§ 4688 *et seq.*

§ 4629. **Costs on appeal.** In all cases of appeal from the final decision of the county commissioners, as provided in § 4627, the appellant shall pay all costs that may accrue in consequence of said appeal, unless the award rendered by the jury in the probate court shall exceed in amount the award rendered by the jury appointed by the county commissioners. [51 v. 388, § 13.]

§ 4630. **When costs and damages paid by county.** If, upon the reception of the decision obtained in the probate court, the county commissioners shall not deem the road of sufficient importance to cause the expenses incurred and damages assessed in the probate court to be paid by the county, they may refuse to establish the same, unless the parties interested in the location of the road, shall pay or cause to be paid, before the opening of the road, to the satisfaction of the county commissioners, in case the road is established a highway, all expenses incurred and damages assessed; but the commissioners, if in their opinion a part only of the road will be of public utility, may record and establish such useful part, and reject the residue, in case it be capable of division. [51 v. 388, § 14.]

§ 4632. **Fees and costs.** For services required by §§ 4627, 4628, the officers and other persons, shall each be entitled to the same fees as they are entitled to by law for like services in other cases; the auditors to be paid out of the county treasury, and the judge and others entitled to fees, to be taxed in the bill of costs in the cause in court. [51 v. 388, § 16.]

APPEALS IN ROAD CASES. ●

§ 4687. **When order to open road may be executed.** No order of the county commissioners for the establishment of a county road, or for the alteration or

vacation, in whole or in part, of a state or county road, or changing the width of a county road, shall be executed until twenty days have elapsed after the entry of such order in the record of the commissioners, and no order shall issue to open any township road until fifteen days after the same has been established, at which time the clerk of the township may issue such order, by direction of the trustees, unless an appeal has been perfected. [53 v. 119, § 1; 74 v. 167, § 33.]

§ 4688. **Who may appeal to probate court.** An appeal from the final order of the county commissioners establishing a county road, or altering or vacating, in whole or in part, a state or county road, or changing the width of a county road, may be taken to the probate court of the same county by any person having an estate in fee, for life, or years, in any lands or tenements situate in any township in the county, in or through which township such new, altered, changed, or vacated road passes, or by the husband of any married woman, or guardian of any ward having such an estate. [53 v. 119, § 2.]

§ 4689. **Appeal bond.** To perfect such appeal, the appellant shall execute with sufficient sureties, or cause to be executed by sufficient sureties, to be approved by the county auditor, a bond or undertaking, payable to the state, in a penal sum of not less than one hundred nor more than three hundred dollars, in the discretion of the auditor, conditioned for the payment by such appellant of all costs that may be adjudged against him in the probate court, or in any other court, to which the proceeding may be removed by petition in error, which bond shall be filed with the auditor on or before the twentieth day after the entry of the order appealed from in the record of the commissioners; but minors, idiots, or lunatics, or their guardians respectively, may appeal without giving bond, by causing an entry to that effect to be made within the period aforesaid, by the county auditor in the record of the commissioners. [53 v. 119, § 3.]

The appeal is perfected when the bond is filed and to the acceptance of the auditor, 24 O. S. 60. Appeal from order to

establish one road and vacate another carries both proceedings, *Id.*

§ 4690. **Auditor to transmit papers to court.** Within ten days after the filing of an appeal bond, or the making of an entry for an appeal, as aforesaid, the county auditor shall transmit to the probate court the original papers in the proceeding, and a certified transcript, from the record of the commissioners, of all proceedings and orders had or made by or before them therein, upon the receipt of which, the probate judge shall forthwith docket the proceedings, styling the petitioners plaintiffs, and the appellants defendants, and shall set a day for the hearing thereof, which shall not be later than the twentieth day after such docketing of the appeal. [53 v. 119, § 4.]

The jurisdiction of the probate court is not lost by failure of the auditor to transmit the necessary papers, 24 O. S. 60.

§ 4691. **When court may affirm or set aside proceedings.** If, upon the hearing of the matter, it appear that the proceedings previous to the appeal were, in substance, regular and legal, and if no exception be taken by any claimant of compensation and damages to the assessment returned to and approved by the county commissioners, the probate court shall affirm the orders of the commissioners, and enter a judgment against the appellants for all costs created by the appeal; but if the previous proceedings are found to be substantially erroneous, the court shall set them aside, and order another view by three disinterested freeholders of the county, to be appointed by the court, who shall perform the same duties that are required by chapter two of viewers appointed by county commissioners, except that they shall make their return to the probate court. [53 v. 119, § 5.]

§ 4646, R. S.

§ 4692. **The order to viewers.** The order to the viewers shall specify a place where, and a day upon which, or within two days, Sunday excepted, thereafter, they shall meet to commence the performance of their duties, and shall require them to make their report on or before a day therein specified, which shall not be later than the twentieth day after the entry of the order in said court; and the court shall

also appoint a surveyor to attend the viewers and perform the duties required by the chapter aforesaid of surveyors, who shall have power to take to his assistance two chainmen and a marker, all of whom shall be disinterested, and he shall deliver a report and plat of his survey to one of the viewers, in time to be returned with their report, and it shall be so returned. [53 v. 119, § 5.]

§ 4693. **When the court must confirm proceedings.** If the proceedings and report of viewers and surveyor, or of the reviewers hereinafter mentioned, be substantially legal, and also substantially coincides with the order of the commissioners appealed from, the court shall confirm such proceedings and report, and shall render a judgment against the appellants for the costs created by the appeal; or, if the report of the viewers be favorable to the petitioners, but materially varies from the order appealed from, the court shall nevertheless confirm the same, if it be within the scope of the petition, and substantially legal; and the court may, in such case, require all the costs created by the appeal to be paid by the appellants, or by the petitioners, or a portion of them by the one party, and the residue by the other, as may be equitable, and shall render a judgment accordingly. [53 v. 119, § 6.]

§ 4694. **When review may be ordered.** If the report of the viewers, appointed by the court, be adverse to establishing, altering, vacating, or changing the width of the road, the court shall, upon the motion of the petitioners, or any twelve of them, but not otherwise, order a review by five disinterested freeholders of the county, to be appointed by the court, to whom an order similar to that hereinbefore prescribed in respect to viewers shall be issued; and such reviewers shall examine the proposed new road, alteration, or change, or road or part thereof, proposed to be vacated, as defined or referred to in the order appealed from, and report in writing to the court their opinions for or against the same, with their reasons; and if their report be such as is mentioned in the first clause of the preceding section, the

court shall proceed as directed in said clause, but if it be adverse to such new road, alteration, change, or vacation, no further proceedings shall be had in the premises, except to render a judgment against the petitioners for all costs that have accrued from the commencement of the proceedings before the commissioners. [53 v. 119, § 7.]

§ 4695. **When other viewers, etc., may be appointed.** When a viewer, reviewer, or surveyor, appointed by the court, is unable or fails to attend to the duty required of him, the court may substitute another in his stead. [53 v. 119, § 8.]

§ 4696. **Oath of viewers, etc.** Every viewer, reviewer, surveyor, chainman, or marker, appointed or selected under the provisions of this chapter, shall, before entering upon his duties, take an oath faithfully and impartially to discharge the duties of his appointment, which oath may be administered by any person authorized by § 4648 to administer an oath, or by any other competent authority. [53 v. 119, § 9.]

§ 4648 authorizes the oath to be administered by the surveyor or one of the viewers or reviewers who has been previously sworn.

§ 4697. **Appeals from township trustees—appeal bond—when filed.** An appeal to the probate court, from the final decision of the trustees of the township, on any petition or report for a road, shall be allowed, and the court may order another view of the road, and assessment of damages, or make any other order which may be just and reasonable in the case, if the appellant enter into bond to the state, for the use of the township, in the sum of one hundred dollars, with sufficient surety, to the acceptance of the township treasurer, within fifteen days from the date of the decision of the trustees, conditioned for the payment of all costs and expenses arising from such appeal, if the road be established, and the assessment of compensation and damages be not increased by the proceedings had in the probate court; which appeal shall be entered with the probate judge within six days from the filing of the bond with the township treasurer. [74 v. 167, § 33.]

§ 4698. **Decision of court certified to township clerk.** The decision obtained in the probate court, as provided in the foregoing sections, shall be certified to the township clerk, who shall notify the trustees thereof; whereupon the trustees shall dispose of the case agreeably to the order of the probate court, and the probate judge shall be allowed to tax the same fees which are by law allowed for similar services in other cases. [51 v. 303, § 34.]

§ 4699. **Appeal from assessment of compensation and damages.** Every claimant of compensation and damages on account of the establishment or alteration of a county or township road, or alteration of a state road, or change in width of a county road, may appeal to the probate court, from the final decision of the county commissioners or township trustees, confirming the assessment of compensation and damages made by the viewers in his behalf, or the refusal of the viewers to award damages to him, which appeal shall be perfected and docketed in the mode hereinbefore prescribed in § 4690, [except that] the appellant shall be the plaintiff, and the obligors in the bond shall be the defendants; and several claimants may unite in a joint appeal, although their claims may be distinct, or they may severally appeal. [68 v. 111, § 10.]

See § 4689. The right of appeal, by which a trial to a constitutional jury is secured, gives validity to the action of the viewers in the first instance, in assessing compensation and damages, 22 O. S. 275; 4 O. S. 167; 5 O. S. 140.

§ 4700. **Proceedings thereon. Jury, how drawn.** Upon such appeal, whether joint or several, the probate court shall confine itself to the questions of compensation and damages presented by it, and shall forthwith, after the docketing thereof, cause a jury of twelve men to be selected and returned by the sheriff and clerk of the county, as provided by law, and, after receiving the names of such jurors, issue a venire commanding them to appear in court, on a day and hour named in the venire, which shall not be later than the twentieth day from its date, to serve as jurors upon the trial of such claims. [68 v. 111, § 10.]

§ 4701. Notice to appellants and obligors. Service. The court shall also issue a summons or notice to all the appellants, whether joint or several, and to the obligors aforesaid, to attend at the same time and place, which summons or notice shall be served by delivering to each person named therein a copy thereof, or by leaving such copy at his usual place of abode; and if any of the parties are non-residents of the county, but have an agent or attorney therein, service on such agent or attorney, in manner aforesaid, shall be sufficient, or a summons or notice may be sent to another county for service upon any party residing or being therein; if an appellant is a non-resident when he perfects his appeal, he shall leave with the probate judge the name of an agent or attorney in the county, upon whom service may be made, and if he fail to do so, no service upon him shall be necessary; and service upon a guardian shall be sufficient service upon his ward. [68 v. 111, § 10.]

§ 4702. Challenges. Talesmen. Oath of jurors. If any of the jurors fail to attend, or for good cause be excused from serving, or be set aside on account of a challenge, the panel shall be filled with talesmen as in other cases; each party shall be entitled to two peremptory challenges, and may make any number of challenges for cause; and in respect to challenges, the appellants whose claims are on trial shall be considered as one party, and the obligors as the other; the jury shall be sworn in all the causes, whether the appeals are joint or several, at the same time, unless for good cause shown the court otherwise direct; and the oath of the jury shall conform, as nearly as may be, to the oath prescribed for the jury in proceedings by corporations to appropriate property. [68 v. 111, § 11.]

§ 6427.

§ 4703. Conduct of the trial. On motion of either party, or of any one of the appellants, the jury shall, under the care of an officer of the court, and with such person or persons as the court may appoint to show them the premises, and before any testimony shall be given, except the plat and field notes of the

road and the title papers of the claimants, if produced, which they shall take with them, proceed to examine the road as established or ordered, and the property of the several claimants taken therefor, or alleged to be injured thereby, and after making such examination, shall return to the probate court, at the time the court shall have appointed; whereupon, or upon the jury being sworn, if no view is moved for, the trial of the claims, in the order the court shall direct, or any number or all of them at the same time, if the parties so agree, shall be proceeded with in the same manner as in other jury trials in the court; but any claimant may elect to have his claim tried separately; and the jury shall render a separate verdict upon each claim, which shall be entered upon the record of the court, and a new trial shall not be granted except for misconduct of the jury, nor shall an appeal, except by petition in error, as hereinafter provided, be taken to any other court. [68 v. 111, § 11.]

§ 4704. Trial by jury after assessment. When an assessment for compensation and damages has been made, or refused, by viewers of a county or township road, or alteration of a state, county, or township road, or change of width of a county road, appointed by the probate court, any claimant may, before the confirmation of the report of the viewers, file exceptions to their decision upon his claim, whether it was rejected altogether, or compensation and damages awarded to him; whereupon such proceedings shall be had for a trial by jury, of his claim, and of any others thus presented, as are provided in the preceding section; and the provisions of said section shall, in all respects, apply to the same. [53 v. 119, § 12.]

§ 4705. When claimant to pay costs. If, by the final decision in the probate court, any claimant of compensation and damages do not obtain a greater sum than was awarded to him by the order of the commissioners or township trustees from which he appealed, he shall pay all costs created by his appeal, so far as the court can ascertain the same, and

judgment shall be rendered against him for the same; and in cases not hereinbefore specially provided for, the court shall give such judgment in respect to costs as may be equitable. [53 v. 119, § 13.]

§ 4706. **Judgment for costs, how rendered.** All such judgments shall be rendered in favor of the state, and may be enforced by execution issued by the probate court, of its own motion, or at the instance of any person entitled to any part thereof, and the money, when collected, shall be paid to the persons respectively entitled thereto. [53 v. 119, § 14.]

§ 4707. **Record.** The probate judge shall make a record of all proceedings had in the probate court under the provisions of this chapter, including the reports and plats of viewers, reviewers, and surveyors, and forthwith, after the termination of the proceedings upon an appeal, transmit to the county auditor, if the appeal was from the county commissioners, or to the township clerk, if it was from township trustees, all original papers received from him, and also a transcript, from the record aforesaid, of the proceedings upon such appeal. [53 v. 119, § 15.]

§ 4708. **When auditor to make record and its effect.** If it appear by the transcript so transmitted to the county auditor that the court has approved the establishment, alteration, vacation, or change of a road, and that the compensation and damages, if assessed in or under the orders of the court, do not, in the aggregate, exceed the amount assessed, approved, and ordered to be paid out of the county treasury before the appeal, the auditor shall forthwith record, in the proper book, the final decision of the court in the premises, with all reports, plats, field notes, or other matters appearing in the transcript necessary to a right understanding of the same, and note in said book the date of such recording; and thenceforth the road shall be established, vacated, altered, or changed, as the case may be, and he shall issue the necessary orders for the payment of the compensation and damages. [53 v. 119, § 16.]

§ 4713. **Decision of court reviewable on error.** The

final decision of the probate court, made under the provisions of this chapter, may be reviewed, upon a petition in error, by the court of common pleas of the proper county, but shall not be reversed for any defect in form if found to be substantially correct; and upon a reversal, a court of common pleas may award a writ of *precedendo*, when deemed necessary. [53 v. 119, § 20.]

TURNPIKES.

§ 4761. **Compensation to land owners.** When the commissioners and owners fail to agree as to the amount of compensation for private property taken for the construction of turnpikes or when the owner is unknown, non-resident or incapable of contracting, this section provides that the compensation shall be ascertained by proceedings had in the name of the county commissioners under the law providing for the appropriation of private property by corporations. [§§ 6414, *et seq.*]

See 18 Bull 308.

ONE MILE ASSESSMENT PIKE.

If the road commissioners and owner can not agree on the price of the material which the former are authorized to procure for the construction and repair of the pike, the commissioners may apply to the judge of the probate court of the county to appoint appraisers to assess the value of such material, § 4782.

§ 4783. **Assessment of damages for material taken.** On the filing of such application the probate judge shall appoint three disinterested freeholders, who, after being duly sworn to impartially assess the value of the material or any part thereof, shall enter upon the premises of the owner of such materials, and assess the value thereof, and the damages that will accrue to the owner by the removal thereof through his premises, and within ten days after appointment return their award to the court; thereupon the probate judge shall require the commissioners to pay for or give security for the payment of all material to be

taken, and damages done to the owner of the premises, and in ten days after the return of the award, on application of the commissioners, furnish them a copy of the same; and they may thereupon enter upon the lands, either inclosed or uninclosed, and remove such stone, gravel or other material, unless an appeal has been taken as provided in the next section. [72 v. 93, § 6.]

Made to apply to county commissioners. [83 v. 167, § 4900.]

§ 4784. **Appeal from assessment.** An appeal from the decision of the appraisers may be taken by either party to the court of common pleas within twenty days after the rendering of the award, upon the appellant entering into an undertaking to the adverse party, in a sum not less than fifty dollars, and in all cases not less than double the amount of such award. [72 v. 93, § 6.]

This proceeding is somewhat analogous to proceedings to appropriate private property by corporations, and if the provisions of the statute in relation to appeals from the probate court to the common pleas court in cases of appropriation of property be complied with in this case, no exceptions can be taken thereto, Gilmore's Probate Practice p. 161, see §§ 2255 *et seq.*

APPEAL IN TWO-MILE ASSESSMENT PIKE CASES.

§ 4834. **Appeal to probate court—proceedings—guardian may act for ward.** All applications for damages shall be barred, unless they be presented as above required, (1) and any person feeling aggrieved by the assessment made may demand of the commissioners to have the same assessed by a jury; in which case the claimant may appeal to the probate court of the county, and the same proceedings shall there be had, and like orders and judgments rendered, as are provided in chapter four; (2) but the guardian of any minor, idiot, or insane person may act for his ward, and all his acts shall be binding upon the ward. [64 v. 80, § 3.]

1. § 4833, provides that "the viewers shall not be required to assess damages to any person except minors, idiots or lunatics, in consequence of the appropriation of any private property for the making of the improvement, unless the owner thereof, or his agent file a written application with the viewers giving a

description of the premises on which damages are claimed by them."

2. Appeals in road cases, §§ 4688 *et seq.* See 42 O. S. 61.

§ 4853. **Commissioners may receive donations and contract for material.** The commissioners may receive subscriptions and donations, in money, or real or personal property, which shall be applied to the construction or improvement of the road, and may contract for and purchase such stone, gravel, or other material as may be necessary for the construction and repair of the road. [74 v. 79, § 11]

§ 4854. **Appointment of appraisers of material.** If the commissioners and owner of such stone, gravel, or other material can not agree on a price deemed fair and reasonable, the commissioners may apply to the judge of the probate court of the county, or if such material is located in another county than that in which the road is located, then to the judge of the probate court of the county in which such material is located, to appoint appraisers to assess the value of the material; thereupon an order shall be entered of record in the office of such probate court, directing that notice in writing be served by the commissioners, upon the person whose property is sought to be appropriated, not less than ten days before the further proceedings herein provided for shall be had; and such notice shall contain a brief description of the property sought to be appropriated, and state the use to which it is to be put, and the time when further proceedings shall be had. [74 v. 79, § 11.]

§ 4855. **Duties of appraisers. Assessment of damages.** Upon the day so fixed, the probate court before whom such application is filed shall appoint three disinterested freeholders, who, after being duly sworn to impartially assess the value of the material, or any part of the same, shall enter upon the premises of the owner and assess the value thereof; and they shall also assess the damages that will accrue to the owner by the removal of the material through his premises, and shall, within ten days after their appointment, return their award to the probate court. [74 v. 79, § 11.]

§ 4856. **Affirmance of the award.** The judge of the

probate court shall, upon the return of the award, furnish the commissioners, on application, a copy of the same, and also furnish a copy to the owner of the material; and thereupon, if neither party signify an intention to appeal to the court of common pleas, the probate court shall at once render judgment for the amount of compensation and damages awarded by the appraisers, and order that, upon payment of such sums and costs, the commissioners may enter upon the lands, either inclosed or uninclosed, and remove such material as may be required to make the road. [74 v. 79, § 11.]

§ 4857. **Appeal to common pleas.** An appeal from the decision of the appraisers to the court of common pleas may be allowed, if taken within thirty days after the rendering of the award; either party desiring to appeal shall give notice at the time, or within three days thereafter, of his intention to appeal to the court of common pleas, and thereupon the probate court shall require such appellant to enter into a bond in a sum not exceeding the value of the property sought to be appropriated, conditioned that the appellant shall perform the judgment of the court of common pleas, and pay all costs and damages adjudged or ordered by such court; when such bond is filed, the probate court shall send all the original papers in the proceeding with a certified copy of the journal entries made in the cause, to the clerk of the court of common pleas; and in that court a jury of twelve men shall be impaneled according to law, to try and determine the amount of compensation and damages that shall be awarded, and such proceedings shall be had as are provided by law to appropriate private property for public use; but such appeal shall not prevent the immediate entry upon the premises by the commissioners, for the purpose of taking material. [74 v. 79, § 11.]

§ 4858. **When road is in more than one county.** When any proposed road improvement contemplated by this chapter is in more than one county, application shall be made by petition to the commissioners of each of the counties, and the commis-

sioners of such counties, upon the petition and bond being filed in their respective counties, shall meet in joint session, at such time and place as the auditor of the county in which the principal petitioners reside shall appoint, in a notice to the auditor of each of the counties in which the petition has been filed; the auditor of the county in which the joint board meets shall be the clerk of the board, and furnish a certified copy of all proceedings to each of the counties interested; and in all subsequent sessions the joint board shall proceed in all respects according to the provisions of this chapter. [74 v. 56, § 1.]

§ 4859. **Appeals in such cases.** Applications may be made by the joint board, to the probate judge of the county in which stone, gravel, or other material is located, to appoint appraisers to assess the value thereof, and damages, and like proceedings shall be had thereon as are provided in other cases; and any person feeling aggrieved by any decision of such appraisers may appeal from such decision to the probate court of such county, and such proceedings shall then be had as are provided for appeals in § 4834, and such orders and judgments be rendered as are there provided for, and the necessities of the case may require. [74 v. 56, § 2.]

Appeals from assessment of damages in reference to material taken to repair improved roads are subject to all the provisions of the statutes relating to the appropriation of material for road purposes; but notice of such appeal shall be filed with the probate judge of the county within ten days after the delivery of the certificate, § 4900.

ABANDONMENT OF CERTAIN ROADS.

§ 4914. **What roads may be abandoned and when.** Any turnpike or plankroad in the state upon which toll has been or may be authorized to be taken, which has been or may hereafter be out of repair for the period of six months, shall be deemed and held abandoned; and upon such abandonment being declared, as hereinafter provided, it shall be unlawful for any company or person owning or claiming to own such road, or any person owning or claiming to

own the right to take tolls thereon, or any person in behalf of such company or person, to take, demand, or receive toll for the use of such road, or so much thereof as may be so declared abandoned. [75 v. 85, § 1.]

§ 4915. **Petition to have same declared abandoned.** Any twelve or more freeholders of a county in or through which any toll turnpike or plankroad, or any part thereof, has been or may hereafter be constructed, may present to the probate court of any county in which such road or part thereof is situate, their petition, stating that such road or part thereof has not been kept in repair for the preceding six months, and praying that the same may be declared abandoned and vacated as a toll road; to which petition the company or persons owning or claiming to own such road, and all persons owning or claiming to own the right to take toll thereon, shall be made defendants. [75 v. 85, § 2.]

§ 4916. **Notice and hearing on petition.** On the filing of such petition the court shall fix a time for the hearing thereof, not less than thirty days nor more than forty days thereafter, and issue a notice in writing to the defendants, stating the filing of such petition, and the day fixed for hearing thereof, and requiring the defendants to appear and answer, which notice shall be served in the same way as a summons in civil cases; and on the hearing of such petition, if the court find that the road or part thereof has been out of repair as aforesaid, the court shall declare the same abandoned and vacated as a toll road. [75 v. 85, § 2.]

§ 4917. **Publication against non-resident.** If any one of the defendants is a non-resident of the state, and this fact is made to appear by affidavit on the filing of the petition, the court shall order notice to be given by the petitioners to such non-resident, by publication for three consecutive weeks, in some newspaper printed and of general circulation in the county, stating the time when such petition will be for hearing, and the object and prayer thereof, which publi-

cation shall be deemed sufficient service. [75 v. 85,
 § 2.]
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TITLE II.

CHAPTER I.

WILLS.

§ 5913. **Construction.** In this title the term "will" shall be construed to include codicils as well as wills; every word importing the masculine gender may extend and be applied to females as well as males; every word importing the singular number only may extend to and be applied to several persons or things as well as one; and every word importing the plural number only may extend to and be applied to one person or thing as well as several. [50 v. 297, §§ 77, 78.]

Definitions. A will is the disposition of one's property to take effect after death. Redfield on Wills, 4th Ed. 5.

A devise is a gift of real property by one's last will and testament. Schouler on Wills, § 8.

A bequest is a gift by will of personal property. *Id.*

A legacy is "that gift or disposition which comes to a survivor through one's last will," Schouler on Wills, § 5. Though the term is more commonly applied to money or other personal property than to real estate, it "acquires a popular sense which regards rather the value of the gift, than the elements real or personal, of which it may happen to be composed." *Id.* § 5.

A codicil is an addition to or qualification of one's last will and testament. Redfield on Wills 287. The codicil is a testator's addition annexed to and to be taken as part of the testament, "being for its explanation, or alteration, or to make some addition to, or else some subtraction from, the former dispositions of the testator," 2 Bl. Com. 500; Schouler on Wills § 7.

A residuary legatee is one to whom the remainder of a testator's estate is given after the payment of his debts, legacies, etc.

A vested remainder is where a present interest passes to a certain and definite person to be enjoyed *in futuro*, and there must be a particular estate to support it.

A contingent remainder is where the estate in remainder is limited either to a dubious and uncertain person or upon the happening of a dubious and uncertain event. A contingent remainder, if it amount to a freehold, can not be limited on an estate for years nor any estate less than a freehold. A contingent remainder may be defeated by the determination or de-

struction of the particular estate before the contingency happens; hence, trustees are appointed to preserve such remainders.

An executory devise is such a disposition of real property by will, that no estate vests thereby at the death of the deviser, but only on a future contingency. It differs from a remainder in three material points, (1) it needs no particular estate to support it; (2) a fee simple or other less estate may be limited by it after a fee simple; (3) a remainder may be limited, of a chattel interest after a particular estate for life in the same property.

§ 5914. **Who may make a will.** Any person of full age and of sound mind and memory, and not under any restraint, having any property, personal or real, or any interest therein, may give and bequeath the same to any person by last will and testament lawfully executed. [72 v. 3, § 1.]

Infants can not make a will. The day of birth must be included in computing the age of attaining majority, 2 Kent; Com. 233; Harr. (Del.) 557; Schoul. § 41; *contra* 1 Redf. 20. A ratification at majority of a will made under age would seem to require re-publication, 1 Redf. 19; Schoul. § 41. But see 1 Jarm. 33.

Married Women.—Coverture is no disability now, § 3114; (84 v. 132.) Before the code a married woman could make a will of her separate property, 5 O. 65.

Insane persons can not make a will but wills of insane persons made during lucid intervals have been sustained, 27 Ga. 593; 1 Monr. 263; 21 La. An. 58; 21 Me. 461; 4 How. (Miss) 459; 9 Pa. St. 151; 2 Green Ch. 629; 1 Phillim. 90; 9 Ves. 611; 11 Ves. 11; 1 Sw. & Tr. 239, 401; 4 Bradf. 226; 14 Pa. St. 417. The burden of proof is on the party alleging a lucid interval, 13 Ves. 87 and cases cited *supra*. Suicide is not conclusive evidence of insanity, 7 Pick 94; 2 Harr. 875, see 85 La. An. 160; 2 Curt. 415; 1 Hagg 109.

Delirium and drunkenness.—Persons suffering from delirium or drunkenness can not make a will. The presumption of continued incapacity is not so strong in cases of delirium as in those of insanity, 4 Met. 545; 58 Me. 453; 9 Or. 128.

Intoxication does not incapacitate unless it disorders the faculties and perverts the judgment, 27 N. Y. 9; 2 Green Ch. 604; 38 Mich. 412; 57 Cal. 274; 22 Wend. 526, see 2 Harr. 875, 883, 884; 1 H. & M. 417; 1 Dallas 94; 2 Aiken 454; 2 Add. 206.

Idiots and imbeciles are devoid of testamentary capacity, 26 Wend. 255; 5 Redf. 93; 21 Vt. 168; 14 E. L. & Eq. 581.

Deaf, dumb and blind.—The law does not prohibit deaf, dumb or blind persons from making a will. Defects of the senses do not incapacitate, if the testator possesses sufficient mind to perform a valid testamentary act, 1 Redf. 56, 57, see 2 Bradf. 42; 285; 4 Id. 226; 4 Johns. Ch. 441; 6 Ga. 324; 101 Pa. St. 495; 1 Green Ch. 82.

Monomaniacs are those persons who are insane upon some one or more subjects and apparently altogether sane upon others, 1 Redf. on Wills 63, 71. Monomania does not destroy testamentary capacity unless the will is the direct offspring of

monomania, 6 Ga. 324; 7 Gill 10; 3 Add. 79; L. R. 5 Q. B. 549; 47 Ill. 192; 33 N. Y. 619; 8 Watts 71; 7 B. Mon. 193; 27 Conn. 192; 65 Pa. St. 342; 136 Mass. 145; 2 Bradf. 449, S. C. 21 Barb. 107; 47 N. H. 120; 45 Ala. 378; 53 Md. 376; 37 N. Y. Eq. 221, see 50 Mich. 448; 3 Wall Jr. 120; 62 Me. 369; 49 Wis. 179; 2 Bull. 147. When it is, it will be refused probate, 5 Redf. 220, 320; 33 N. Y. 619; 24 Ga. 640; 136 Mass. 145.

Eccentricities of character are not sufficient to invalidate a will, 32 La. An. 1055; Taylor's Med. Jur. 776; 36 Am. Rep. 426; 1 Spinks 357; nor is a belief in witchcraft, spiritualism and the like, 2 Bradf. 449; 5 Ind. 137; 61 Ia. 23; 63 Me. 369; 53 Md. 376; 39 Miss. 19; 52 Wis. 543; 8 Redf. 884.

Moral depravity does not incapacitate, 2 Bull. 147.

Senile dementia is that peculiar decay of the mental faculties, which occurs in extreme old age, and in many cases much earlier whereby the person is reduced to second childhood, and becomes sometimes wholly incompetent to enter into any binding contract or even to execute a will, 1 Redf. on Wills 63. Senile dementia disqualifies a person from making a will, but old age alone does not, Schouler on Wills, § 134; 2 Hagg. 142; 5 Johns, Ch. 148; 2 Bradf. 860; 72 N. Y. 269, 276; 2 Phillim 449, 461.

"There is no presumption against a will, because made by a man of advanced age, nor can incapacity be inferred from an enfeebled condition of mind or body," 72 N. Y. 269, 276, see 2 B. Mon. 74, 79; L. R. 5 Q. B. 549, 566; 2 J. J. Marshall 340; 10 S. & R. 84; 3 Denio 37; 32 N. J. Eq. 701; 101 Pa. St. 495; but see also 38 N. J. Eq. 211; 7 Lans. 465; 23 Hun 139.

Undue influence.—"Whatever delays free agency and constrains a person to do against his will and what he would not do if left to himself is undue influence whether the control were exercised by physical force, threats, importunity or any other species of mental or physical coercion," see 60 Md. 286; 33 N. J. Eq. 494; 33 Ala. 611; 38 Ala. 131; 19 Ark. 553; 5 Harring 459; 21 Ga. 552; 45 Ill. 485; 26 Md. 95; 15 N. J. Eq. 243; 99 Mass. 84; 2 Wend. 526; 63 N. Y. 504; 77 Id. 394; 88 Id. 357; 43 Pa. St. 46; 76 Pa. St. 106. But influence obtained by honest argument or persuasion is not, 34 N. Y. 197; 74 Ill. 33; 41 Pa. St. 312; 32 N. J. Eq. 288; 99 Mass. 88; 112; nor by flattering speeches, without fraud, 4 Greenl. 220; indelicate or improper arguments, 17 Barb. 236; 76 Pa. St. 106, nor by a wife over her husband in absence of fraud, 32 N. J. Eq. 701; 38 Mich. 412; 22 Wend. 526; 61 Mo. 295; 75 Ill. 260; see 4 Me. 220; 90 Ill. 134; 1 Duv. 203. Distinction between influence of wife and mistress, 5 Am. Prob. Rep. note p. 436. What constitutes undue influence, Id. note p. 589, what does not, p. 590. Mere existence of improper influence not evidence of exercise of undue influence, 84 Mo. 293. No presumption of undue influence from legacy to draughtsman, testator's counsel, 91 N. Y. 539, see 3 Am. Prob. Rep. note p. 52.

Joint Wills.—Tenants in common may join in making a will, 39 O. S. 639. It has been held that two can not make a joint will, 14 O. S. 157 (*contra* 1 Deane & Swab, 6; 1 Bradf. 476) unless all the property belongs to one, 2 C. S. C. R. 440.

§ 5915. Bequest or devise to charitable purposes, when void. If any testator die leaving issue of his body,

or an adopted child, living, or the legal representatives of either, and the will of such testator give, devise, or bequeath the estate of such testator, or any part thereof, to any benevolent, religious, educational, or charitable purpose, or to this state or to any other state or country, or to any county, city, village, or other corporation or association in this or any other state or country, or to any person in trust for any of such purposes, or municipalities, corporations, or associations, whether such trust appears on the face of the instrument making such gift, devise, or bequest or not, such devise, or bequest, shall be invalid unless such will shall have been executed according to law, at least one year prior to the decease of such testator. [72 v 3, § 1.]

This act is constitutional, 20 O. & 300. The devise or bequest must be made at least a year prior to testator's death, 20 O. & 300, 11 C. II 320. A gift to a charitable use should receive the most liberal construction, 20 O. 435, and will not fail in consequence of the indefiniteness of the object, 3 Redf. 602. A devise to the "poor and needy" of a named township is valid, 1 O. & 100 and a devise for support of parents with remainder to named parties for the support of religion, 20 O. & 37 and of a remainder for the advancement of the christian religion, 24 O. & 425, and a devise for the preaching of the gospel among the places where it was to be preached, 20 O. & 20 and a bequest to a charitable institution to be chosen by a trustee or executor, 11 Bull 197 and to the Home Missions though there was nothing to indicate what Home Mission was intended, 11 Bull 205, and a devise for the education of the poor children of Zanesville, 2 O. 20 20 O. 470, have been upheld and a devise to named persons as trustees of an unincorporated church, 1 O. & 474, takes effect when it becomes incorporated, 1 v 1 311. The statute of charitable uses is not in force here, 1 O. & 100. A trust does not exist when the trustee fails, 1st 2 O. 426 7 O. 311 217.

County commissioners, 41 O. & 711, § 20 R. 6, 10 O. & 200, and township trustees may take by devise, 20 O. & 100. Devise to township means township as organized at testator's death, 20 O. & 110.

Miscellaneous.—Legacy for charitable masses, 134 Mass. ng masses valid, see 20 N. Y. 451, 8 C. 246 p. 60. 20 Bull 215, 207 13 Bull 92, acts for public purposes not charitable, v 207. That a witness to a will is a de institution and a distributee upon will will not defeat a bequest thereby, 11 mayor in trust to be expended by him d charity" in his discretion held good, the Rochester, N. Y. Theological Seminary \$10,000, is a gift of Bull 54. Deposit of money to be ex-

pended for reading masses for repose of souls a valid trust, 14 Bull 314. A bequest of money for establishment of home for orphan girls to be educated for employment in stores, seamstresses or domestics, etc., does not warrant incorporation of home whose primary object is the fitting and training of such orphan girls as nurses, 15 Bull 397.

§ 5916. **How will made.** Every last will and testament (except nuncupative wills hereinafter provided for) shall be in writing, and signed at the end thereof by the party making the same, or by some other person in his presence and by his express direction, and shall be attested and subscribed in the presence of such party, by two or more competent witnesses, who saw the testator subscribe, or heard him acknowledge the same. [50 v. 297, § 2.]

Form of Will.—I, A. B. of Cincinnati, Hamilton County, Ohio, do hereby make my last will and testament.

I appoint my son C. D. sole executor of this will and direct that he shall not be required to give bond in qualifying as such executor.

I give and bequeath to E. T., G. H. and I. J. the sum of one thousand dollars each. I give and bequeath to my servant K. L. the sum of one hundred dollars. All the residue of my estate real and personal, I give, devise and bequeath to my children C. D., M. N. and O. P., to be divided among them in equal portions.

In testimony whereof, I have hereunto set my hand this first day of September in the year one thousand eight hundred and eighty eight.

A. B.

Signed, published and declared by the above named A. B. as and for his last will and testament in presence of us, who in his presence, and in the presence of each other, and at his request have hereto subscribed our names as witnesses.

Q. R.

S. T.

Form of Codicil.—I, A. B. make this codicil to my last will and testament which was dated Sept. 1, 1888. I cancel and revoke the legacy of one thousand dollars given to G. H.

I give to my son C. D. executor of my will in addition to the portion given him under my will one thousand dollars.

In all other respects I confirm my will.

Witness my hand this first day of October in the year one thousand eight hundred and eighty eight. A. B.

Signed, published and declared by the above named A. B. as and for a codicil to his last will and testament in presence of us who in his presence and in presence of each other and at his request have hereto subscribed our names as witnesses.

L. B.

G. F.

This form of attestation is more full than the law requires. Under our statute the witnesses need not sign in each others presence See *infra*.

In writing.—If a portion or a whole of the will is in print, engraving or lithograph it is a sufficient compliance with the statute, 9 Pick. 312; 4 Vt. 536; 2 M. & S. 236; L. R. 2 P. & D. 367; 3 *Id.* 159.

It may be written with pencil instead of ink, 1 Hagg. Eccl. 219; 2 Phillim 173; 18 Ves. 348; 84 Pa. St. 510; 39 Md. 535, but a will written on a slate was not admitted to probate, 11 Phila. 541. A testator may write his will in any language he may choose, 1 Phillim 53, provided he understands what the will contains, *Id.* 21 Rep. 95; but he need not understand the language in which it is written, 64 Wis. 487.

No precise form of language is essential to the validity of a will, 1 Redf. on Wills 174, provided the testamentary intent is shown, 53 Me. 561; 14 Ga. 596; 2 Hagg. 248; 2 Ves. Jr. 231; 1 McCord 409. An entry in a book held not a will, W. 406.

Signing by mark, 16 B. Mon. 102; 3 Strobb. 297; 12 Cush. 332; 5 John. 144; though testator was able to write at the time, 8 R. I. 252; 28 Md. 115; 11 Allen 49; 61 Pa. St. 196; 8 Ad. & El. 94; 19 Mo. 609, is sufficient. So also is signing by initials, 15 Jur. 1042. "And if a testator in making his mark is assisted by some other person and acquiesces and adopts it, it is just the same as if he had made it without any assistance," 12 Simons 28. "The hand of the testator may be guided by another, whenever he is physically unable to subscribe the will without such assistance, and it is not necessary to prove any express request for such assistance on his part," 1 Redf. on Wills 205; 12 Simons 28; 29 Pa. St. 232; 44 Barb. 494; see 4 Wash. (U. S. Cir.) 262.

Signing a fictitious or assumed name has been held sufficient, 2 Rob. 339, and signing by stamp where testator was paralyzed, 3 W. & Tr. 93. A seal is not required, W. 53.

Signed at the end.—Where testator made and signed his will, but without having it witnessed, and subsequently added another provision in regard to the ultimate disposition of the property named before, and then had it witnessed, but without signing the same again, it was held that the whole was inoperative as not being signed "at the end thereof" in conformity with the statute, 17 O. S. 134, see generally 6 Pa. St. 408; 1 Duv. 126; 91 N. Y. 261; 516; 13 Barb. 17; 5 Whart. 386; 2 Green. Ch. 625; 107 Pa. St. 381; 79 Ky. 607; 3 Am. Prob. Rep. note p. 142; 94 N. Y. 535. Where the testator signs the will on several sheets or in different places, the last signature if at the end of the will is held the efficient one, Schouler on Wills § 314; 58 Pa. St. 238.

Signed by some other person in testator's presence.—This may be done by one of the witnesses, 11 Bull 59 (13 Sup. 50); 36 Ala. 496; 81 Ind. 1; 27 Barb. 556. The mere fact that testator's name is written or his mark made by another person, affords no presumptive evidence that it was done at his request and in his presence, 11 Pa. St. 489. "A subscription A. B. for C. D. at his request" is held a sufficient form, 17 Ark. 292; 30 Pa. St. 218.

Attestation and subscription by witnesses.—Subscription of witnesses may be by mark, 59 Ga. 472; 58 N. H. 7; 7 Humph. 92; 8 Ves. 185; 2 Rob. 116; 3 Curt. 736, or by initials, 2 Rob. 110, *contra* 1 Hill Ch. 265. Sealing is not sufficient, 3 Curt. 117. Witness's hand may be guided by another, 3 Bradf. 227, and it has been held that witness's name may be written by another

at his request, 6 Gratt. 57; 16 B. Mon. 102; see 58 N. H. 7, though our statute is not, as in case of testator's subscription, express upon this subject. In any case the subscription must be made *animo attestandi*, L. R. 1 P. & D. 269, 277; 29 L. J. Prob. 114; 1 Rob. 712. The presumption is that testator and witnesses signed the will in the presence of each other, 29 O. S. 379, but it is not essential that witnesses should see the testator sign if he acknowledged his signature, 7 O. (pt. 2) 89, nor that the witnesses should attest the will at the same time or in the presence of each other. 6 O. S. 307, nor that the acknowledgement of subscription be made in words, *Id.*; 33 O. S. 598, nor that the testator acknowledge to each or both the attesting witnesses that the signing was done in pursuance of his previous express authority and in his presence by the person signing for him, *Id.* Attestation made in the same room with testator, 33 Ga. 289; 1 Leigh 6; 31 N. J. Eq. 242, 252; if he is enabled to perceive the act, 26 Ga. 294; 1 Leigh 6; 12 B. Mon. 619; 19 Mich. 482; 42 Wis. 482; or in an adjoining room, 48 Ind. 502; 11 Ired. 632; 74 Ill. 109; 10 Gratt. 106; 44 Wis. 392, is sufficient, but not if made in an adjoining room out of testator's sight though the door between stands partly open, Schoul. § 342; 2 Cush. 433; 31 N. J. Eq. 242; 33 Ga. 289; but see 10 Bull 237.

When testator is blind the attestation should be made where he may perceive the act by his other senses, 3 Curt. 63; 135 Mass. 238; 3 Strobb. 297. Will established against positive evidence of attesting witnesses to fact of execution, 95 N. Y. 329. Necessity of acknowledgement of signature and will, 3 Am. Prob. Rep. note p. 247. Failure of recollection of subscribing witnesses can not defeat probate of will, 91 N. Y. 255.

The witnesses must be competent.—One having an immediate beneficial interest in a will is disqualified at common law, 10 Allen 155; 46 N. H. 125; 23 Pick. 10. As to the effect of a witness being a devisee or legatee, see § 5925. Amanuensis of testator in drawing will, not disqualified as witness, 12 Bull 189.

What instruments held to be a will.—Informal, 50 Cal. 595; 21 La. Ann. 280. Instrument in form of deed, 2 Swan. 654; 2 Ves. Jr. 231; 51 Pa. St. 126; 68 Mo. 584; 11 Bull 131, held to be a deed and not a will, 2 Head. 561; 24 Ala. 122. Assignment held to be a will, 88 Pa. St. 111; 62 Ga. 627; Memorandum, 9 Gill. 44; 31 Ala. 59. Note, indorsement on, 4 Ves. Jr. 555; 4 N. H. 434; see 3 B. & A. 233; 19 Conn. 7. Checks held codicils, 3 Phillim 317. Distinction between deed and will, 111 Ill. 563. Instrument in nature of contract, 86 Ind. 289. Written promise to pay sum of money after the death of the maker placed in hands of second person with injunctions to deliver it after his decease not a will, 8 O. S. 239. Deed, what constitutes a delivery in escrow so as to pass title 37 O. S. 132, what does not, 42 O. S. 47; will in form of letter, 61 Md. 206. Agreement between two saving bank depositors that the survivor shall have the others deposit, each retaining absolute title and control of his deposit, not valid as a will, 12 Bull 290.

§ 5917. **May be deposited with probate judge**—**Notice of probate.** Any will in writing may be deposited, by the person making the same, or by some person for

him, in the office of the judge of the probate court in the county in which such testator lives, to be safely kept until delivered or disposed of as hereinafter provided; and the probate judge on being paid the fee of one dollar therefor, shall receive and keep such will, and give a certificate of deposit therefor; and no will shall be admitted to probate without notice to the widow or husband and next of kin of the testator, if any, resident in the state, in such manner and for such time as the probate court shall direct or approve. [75 v. 839, § 5; 76 v. 112, § 1]

STATE OF OHIO, _____ COUNTY, ss.:
Probate Court _____ County.

Form of Notice.—To A. B. of _____ county. We command you that you notify _____ [5 days' notice required in Hamilton county] that a paper purporting to be the last will and testament of C. D., late of said county deceased, has been filed in the office of the probate court of said county; and that the same will be offered for probate and record before the judge of the probate court at the court house in _____ in said county, on the _____ day of _____ A. D. 188— at _____ o'clock—M.

In witness whereof, I _____ judge of the said court, have hereunto set my hand and affixed the seal of the said court, at _____ this _____ day of _____ A. D. 188—.

_____ Probate Judge.
By _____ Deputy Clerk.

State of Ohio, _____ county. Personally appeared before me, the undersigned I, judge of the probate court, in and for the county of _____ A. B. who upon oath deposes and says that on the _____ day of _____ 188— he served the persons named herein personally with a true copy of the within notice.

_____ A. B.
Sworn to and subscribed before me, this _____ day of _____ A. D. 188—.

_____ Probate Judge.
By _____ Deputy Clerk.

Form of waiver of notice.—Probate Court, _____ county, Ohio.

Probate of the last will and testament of _____ late of _____ county, deceased.

Cincinnati, O. _____ 188—.

We, the undersigned, next of kin [or widow and next of kin] of said decedent residents of Ohio, hereby waive notice, and consent to the probate of said will of _____ deceased.

_____ residence.
_____ "

WITNESSES.

§ 5918. How such will enclosed, etc. Every will intended to be deposited as aforesaid, shall be inclosed

in a sealed wrapper, which shall have indorsed thereon the name of the testator, and the said probate judge shall indorse thereon the day when, and the person by whom it was delivered; and the wrapper may also have indorsed the name of any person to whom it is to be delivered after the death of the testator; and it shall not be opened or read until delivered to a person entitled to receive the same, or otherwise disposed of as hereinafter provided. [50 v. 297, § 4.]

§ 5919. To whom it may be delivered. Such will shall, during the lifetime of the testator, be delivered only to himself, or to some person authorized by him, by an order in writing, duly proved by the oath of a subscribing witness; and after his death it shall be delivered to the person named in the indorsement on the wrapper of the will, if there be any person so named, who shall demand it. [50 v. 297, § 5.]

§ 5920. When to be opened. If no person shall demand the will in pursuance of such appointment, it shall be publicly opened in the probate court, within two months after notice of the death of the testator, and shall be retained in the office of the probate judge, until offered for probate; or if the jurisdiction belongs to any other court, it shall be delivered to the executor or other person entitled to the custody of it, to be presented for probate in such other court; and if the jurisdiction of such will belongs to the probate judge opening the same, he shall immediately give notice to the executor or executors, if any are named in such will, and if none are named therein, then to other persons immediately interested, of the existence of such will. [50 v. 297, § 6.]

§ 5921. Who may enforce the production of a will and how. If any real or personal estate shall be devised, or bequeathed, by any last will, the executor of such will, or any person interested therein, may cause the same to be brought before the probate court of the county in which such estate may be, and the court may, by citation, attachment, or warrant, or if circumstances require it, by warrant or attachment in

the first instance, compel the person having the custody or control of such will to produce it before the court for the purpose of being proved. [50 v. 297, § 7.]

1 C. C. R. 95, 97.

§ 5922. Into what counties such process may issue. The process mentioned in the preceding section may be issued into any county in the state, and shall be served and returned by the sheriff, or other officer to whom it may be delivered. [50 v. 297, § 8.]

§ 5923. Liability of officer serving same. The officer to whom such process may be delivered shall be liable for neglect in the service or return of such process, in like manner as sheriffs are, or may be by law, liable for neglect in not serving or returning a *capias* issued upon an indictment. [50 v. 297, § 9.]

§ 5924. Punishment and liability of person refusing to produce will. If the person having the custody or control of a will, shall, without any reasonable cause, neglect or refuse to produce the same for probate, after being duly cited for that purpose, he may be committed to the jail of the county, there to be kept in close custody until he shall produce the will, and he shall be further liable to the action of any party aggrieved, for the damages which may be sustained by such neglect or refusal. [50 v. 297, § 10.]

§ 5925. Effect of a person being a devisee or legatee. If a devise or bequest is given to a person who is a witness to the will, and the will can not otherwise be proved than by the testimony of such witness, the devise or bequest shall be void, and the witness shall be competent to give testimony of the execution of the will, in like manner as if such devise or bequest had not been made; and, if such witness would have been entitled to any share of the testator's estate, in case the will was not established, so much of such share as shall not exceed the bequest or devise to him shall be saved to him; and the devisees and legatees shall contribute for that purpose in the mode hereinafter directed for absent or after-born child. [50 v. 297, § 11.]

§ 5926. **Examination of witnesses to will.** The said court shall cause the witnesses to such will, and such other witnesses as any person interested in having the same admitted to probate, may desire, to come before such court; and said witnesses shall be examined in open court, and their testimony reduced to writing, and filed. [50 v. 297, § 12.]

Form of examination.—Probate court, _____ county, Ohio. Probate of the last will of A. B. deceased, late of _____ county, Ohio, presented on the _____ day of _____ A. D. 18____. Personally appeared in open court C. D. and E. F. the subscribing witnesses of the last will and testament of A. B. deceased, and being duly sworn according to law, to speak the truth, the whole truth and nothing but the truth, in relation to the execution of said will, depose and say: that they saw said A. B. deceased subscribe said will at the end thereof, that at the time of signing said will deceased was of legal age and of sound and disposing mind and memory, and under no undue or unlawful restraint whatsoever; and that they subscribed their names as witnesses in the presence of deceased.

(Signed.)

Subscribed and sworn to in open court this _____ day of A. D. 188____

_____, Probate Judge, etc.

Notes.—In the proceedings authorized for admitting a will to probate, persons interested in resisting its probate are not allowed to introduce evidence to contest its validity, 4 O. S. 383. Nor is it required that those interested adversely should be summoned, as no issue is made for a contest between adverse parties, *Id.* Witnesses should all be called but error will not lie for the omission to call all the witnesses, 29 O. S. 220.

§ 5927. **How will proved, if witnesses unknown or incompetent, etc.** If it shall appear to the court, when the will is offered for probate, that any witness thereto is gone to parts unknown; or if the witnesses to a will were competent at the time of attesting its execution, and afterward became incompetent, or the testimony of any witness can not for any reason be obtained within a reasonable time, the will may be admitted to probate, and allowed upon such proof as would be satisfactory, and in like manner as if such absent or incompetent witness were dead. [50 v. 297, § 13.]

§ 5928. **When court may issue commission to take their testimony.** The court may issue a commission, with the will annexed, directed to any suitable per-

son or persons to take the deposition of any witness to a will who resides out of the jurisdiction of the court, or who resides within it and is infirm and unable to attend court; and every deposition so taken, certified, and returned by any one or more of the persons named in such commission, shall be valid as if taken in open court. [50 v. 297, § 14.]

§ 5929. **Admission of will to probate.** If it shall appear that such will was duly attested and executed, and that the testator, at the time of executing the same, was of full age and of sound mind and memory, and not under any restraint, the court shall admit the will to probate. [50 v. 297, § 15.]

A will can not be received as evidence nor can title be set up under it until probated, 8 O. S. 328. The order of the court of probate which recites that the will was presented for probate and that the subscribing witnesses were sworn and examined in open court and their testimony reduced to writing and filed by the order of the court, and that thereupon the court ordered the will to be filed and admitted to record is sufficient evidence that the will was proved according to law and ordered to be recorded, 8 O. S. 384, for the solemn adjudication of any court having jurisdiction of the subject matter is not void, but is valid until reversed, 11 O. S. 257. The domicile is the place of probate and not the place of death, 23 O. S. 491, but the place of probate need not be at the county seat, 11 O. S. 257; it may be in any county where property is left, 16 O. S. 488, but letters testamentary can only issue from the probate court of the county in which testator resided at the time of his death. *Id.*

§ 5930. **Filing and recording.** Every will, when admitted to probate, shall be filed at the office of the probate judge, and recorded, together with the testimony, by said judge or his clerk, in a book which shall be kept by him for that purpose. [50 v. 297, § 16.]

§ 5931. **Certified copy of will, etc., evidence.** A copy of such recorded will, with a copy of the order of probate annexed thereto, certified by the said judge of probate under seal of his court, shall be as effectual in all cases as the original would be, if produced and established by proof. [50 v. 297, § 17.]

25 O. S. 260.

§ 5932. **Recorded in each county where real estate is situate.** If real estate devised by will is situate in any other county than that in which the will is proved, an authenticated copy of the will and order

of probate shall be admitted to record in the office of the probate judge of each county in which such real estate may be situate, upon the order of such probate judge, and shall have the same validity therein as if probate had been had in such county. [50 v. 297, § 18.]

§ 5933. Uncontested probate after two years binding. If no person interested shall, within two years after probate had, appear and contest the validity of the will, the probate shall be forever binding; saving, however, to infants and persons absent from the state, or of insane mind. or in captivity, the like period, after the respective disabilities are removed. [85 v. 99; 50 v. 297, § 19.]

See § 5866. Code of Civil Procedure. A will set aside at the instance of any person included within the saving clause of the statute is wholly annulled and the entire estate will be distributed according to law, 10 O. 372.

§ 5934. Appeal from refusal to admit will to probate. In case of the refusal to admit a will to probate, any person aggrieved thereby may appeal from such decision to the next term of the court of common pleas, by filing notice of his intention to appeal within ten days. [51 v. 167, § 22.]

Formerly appeal did not lie, 6 O. 148. and does not lie from refusal to admit authenticated copy of foreign will, 2 C. C. R. 387.

§ 5935. How appeal perfected and proceedings in common pleas. The person appealing shall procure and file in the court of common pleas a certified copy of the order of said probate court, rejecting the will, together with the will, and thereupon said appeal shall be deemed perfected; and the court of common pleas, on the hearing, shall take testimony touching the execution of such will, and have the same reduced to writing; and the final order of the court of common pleas shall, together with the will and testimony so taken, be certified by the clerk to the probate court; and if by such order the will is admitted to probate, the will, order, and testimony shall be recorded in the probate court. [51 v. 167, § 23.]

§ 5936. Duty of judge on notice of contest. Whenever the probate court shall receive from the clerk of the court of common pleas a certificate that a petition has been filed in the court of common pleas to contest the validity of any will admitted to record or recorded in the probate court, the probate court shall forthwith transmit to the court of common pleas, the will, testimony, and all papers relating thereto, with a copy of the order of probate, attaching the same together and certifying the same under the seal of the court; and a copy of the final judgment, on such contest, shall be certified by the clerk of the court of common pleas to the probate court; and the said clerk shall also transmit to the probate court the will and other papers transmitted as aforesaid to the common pleas; and the same shall be deposited and remain in the probate court. [51 v. 167, §§ 24, 25.]

See § 5858-5866. Code of Civil Procedure. Error and not appeal lies from judgment of Common Pleas to Circuit Court in cases to contest will, § 5865.

§ 5937. Will executed in other States admitted to record here and its effect. Authenticated copies of wills executed and proved according to the laws of any state or territory of the United States, relative to any property in the state of Ohio, may be admitted to record in the probate court of any county in this state, where any part of such property may be situated; and such authenticated copies, so recorded, shall have the same validity in law, as wills made in this state, in conformity with the laws thereof, are declared to have; provided, that where any such will, or authenticated copy, has been or shall hereafter be admitted to record, in the probate court of any county in this state, where any part of such property may be situated, a copy of such recorded will, with the copy of the order to record the same annexed thereto, certified by the probate judge, under the seal of his court, may be filed and recorded in the office of the probate judge of any other county in this state, where any part of such property is situated, and it shall be as effectual, in all cases, as the authenticated copy of said will would be, if proved and admitted to record by the court. [50 v. 297, § 26.]

A will made in a sister State though proved and recorded in that State, must be admitted to record in this State before the title of a devisee to land in this State can be deemed complete, 6 O. 172, but the laws of Ohio govern in the construction of such will disposing of lands situated in this State, 21 O. 8. 56. Such will takes effect from the death of the testator and not from the date of its record in Ohio, 9 O. 96; 8 O. 239. The provisions of § 5939 requiring the giving of notice by publication of the application to admit a foreign will to record in Ohio do not apply to wills executed and admitted to probate in a sister State, 29 O. 8. 379 (act 1840), and when an authenticated copy of a will executed and admitted to probate in a sister State is admitted to record in this State, and afterwards a copy of such record is filed and recorded in another county, the latter record may be given in evidence in an action for the recovery of lands devised under the will, although so admitted to record after the action was commenced. *Id.* To admit an authenticated copy of a will from another State to record in this State, the original will must have been admitted to probate and record, and the court admitting it must be satisfied of that fact, 15 Bull 819, affirmed, 2 C. C. R. 387. Appeal does not lie to common pleas from judgment of probate court refusing to admit authenticated copy of such will to probate. 2 C. C. R. 387. A proceeding in the probate court on application to have an authenticated copy of a foreign will admitted to probate is an adversary one and the rule of *res adjudicata* applies to it, 18 Bull 391, but see 2 C. C. R. 387.

§ 5938. Probate, etc., of will made out of the United States. A will executed, proved, and allowed, in any country other than the United States and territories thereof, according to the laws of such foreign state or country, may be allowed and admitted to record in this state, in the manner and for the purpose mentioned in the following sections. [50 v. 297, § 27.]

§ 5939. Proceedings to admit will to record which has been probated without the state. A copy of the will and probate thereof, duly authenticated, shall be produced by the executor, or by any person interested therein, to the probate judge of the county in which there is any estate upon which the will may operate, whereupon said probate judge shall continue the motion to admit such will to probate, for the term of two months, and notice of the filing of such application shall be given to all persons interested, in some public newspaper printed or in general circulation in the county, where such motion is made, at least three weeks successively; the first publication to be at least forty days before the time set for the final hearing of said motion. [50 v. 297, § 28.]

5937 n; 29 O. S. 379.

§ 5940. Admission and effect of admission to record. If, on hearing, it shall appear to the court that the instrument ought to be allowed in this state, the court shall order the copy to be filed and recorded; and the will, and the probate and record thereof, shall then have the same force and effect as if the will had been originally proved and allowed, in the same court, in the usual manner; provided, however, that nothing herein contained shall be construed to give any operation or effect to the will of an alien, different from what it would have had if originally proved and allowed in this state. [50 v. 297, § 29.]

§ 5941. Powers of executor or administrator under will made out of this state. After allowing and admitting to record a will, pursuant to any of the four preceding sections, the court may grant letters testamentary thereon, or letters of administration with the will annexed, and shall proceed in the settlement of the estate, that may be found in this state; and the executor taking out letters, or the administrator with the will annexed, shall have the same power to sell and convey the real or personal estate by virtue of the will or the law, as other executors, or administrators with the will annexed, shall or may have by law. [50 v. 297, § 30.]

§ 5942. Will not admitted to probate or record void. No will shall be effectual to pass real or personal estate, unless it shall have been duly admitted to probate or record, as provided in this title. [50 v. 297, § 31.]

See 8 O. 5; 14 O. S. 328. A will executed in another state takes effect from the death of testator and not from the date of its record in this state, 9 O. 96.

§ 5943. Effect of devisee withholding will from probate for three years. No lands, tenements, or hereditaments, shall pass to any devisee in a will, who shall know of the existence thereof, and have the same in his power to control, for the term of three years, unless, within that time, he shall cause the same to be offered for, or admitted to probate; and by such neglect, the estate devised to such devisee shall descend to the heirs of the testator. [50 v. 297, § 32.]

Limitation for recording refers to original probate, 29 O. S. 379; (act 1840.)

SPOLIATED WILLS.

§ 5944. Wills when lost or destroyed may be admitted to probate. The probate court shall have full power and authority to admit to probate, any last will and testament which such court may be satisfied was duly executed according to the provisions of the law upon the subject in force at the time of the execution of such last will and testament, and not revoked at the death of the testator, when such original will has been lost, spoliated, or destroyed, subsequent to the death of such testator, or after the testator has become incapable of making a will by reason of insanity, and it can not be produced in court in as full, ample, and complete a manner as such court now admits to probate last wills and testaments, the originals of which are actually produced in court for probate. [64 v. 20, § 47.]

Lost or spoliated wills can not be probated unless they existed after testator's death, 5 O. S. 290; 28 *Id.* 491, but the omission of the record to state that the destruction of the original will was subsequent to the death of testator does not render the order admitting such will to probate void, 23 O. S. 491. Not every variance between a spoliated will as made and the will as admitted, to probate will avoid the latter, 12 O. S. 437. Devisees and legatees may maintain proceedings in the probate court to have spoliated wills admitted to probate, 1 C. C. R. 95, and after the will has been admitted to probate may maintain an action for damages against the person who spoliated the will and recover as damages reasonable fees paid attorneys for their services in having the will admitted to record, *Id.* Testators declarations admissible to rebut presumption of revocation and prove contents of will, 124 Mass. 252, 258; 8 Mich. 411; 40 Conn. 537; 32 Ga. 156. Proof of contents of lost will by single witness, 118 Ill. 576.

§ 5945. Notice of application. In all cases where application shall be hereafter made to the probate court to admit to probate a will duly executed as aforesaid, and which has been lost, spoliated, or destroyed, as aforesaid, it shall be the duty of the party seeking to prove the same, to give a written notice to all persons whose interest it may be to resist the probate, and who reside in the county where the testator resided at the time of his death or to their agent or attorney, five days before the day on which such proof is to be made, or to give notice, by publi-

cation in a newspaper printed in the county, thirty days before the day set for hearing such proof. [50 v. 297, § 48.]

When no person interested in resisting the probate of a lost, spoliated or destroyed will resides within the county in which application is made to admit the same to probate, notice must be given in the manner and for the time designated in the statute, 26 O. S. 541.

§ 5946. Examination of witnesses. In all such cases, the said court shall cause the witnesses to such will so executed and lost, spoliated or destroyed, and not revoked, and such other witnesses as any person interested in having such will admitted to probate may desire to come before such court, and said witnesses shall be examined by said probate judge, and their testimony reduced to writing and filed by him in his court; provided, that in all cases where it may be necessary so to do, in consequence of witnesses residing out of the jurisdiction of said court, or who reside within such jurisdiction and who are infirm or unable to attend court, the court may order the testimony of such witnesses to be taken and reduced to writing by some competent person, which testimony shall be filed in such probate court. [50 v. 297, § 49.]

§ 5947. On what proofs, will established. If the court, upon such proof, shall be satisfied that such last will and testament was duly executed in the mode provided by the law in force at the time of its execution, that the contents thereof are substantially proved, and that the same was unrevoked at the death of the testator, and has been lost, spoliated, or destroyed subsequent to the death of such testator, or his becoming incapable, as aforesaid, such court shall find and establish the contents of such will as near as the same can be ascertained, and cause the same and the testimony taken in the case to be recorded in said court; and in any case in which a will has been or may hereafter be lost, spoliated, destroyed, mislaid or stolen, after the same has been duly admitted to probate, but before it has been recorded, the court, upon notice being given, as provided in § 5945 of this title and chapter, to persons whose interest it may be to resist the probate and record of

said will, may hear testimony, and, if satisfied that the contents of said will have been substantially proved, record said will as thus proven, which record shall have all the force and effect of a record of the original will. [80 v. 24; 50 v. 297, § 51.]

§ 5948. **Effect of will so established.** The contents of any such last will and testament so found, established, and admitted to probate, as aforesaid, shall be as effectual to pass real and personal estate, and for all other purposes, as if the original will had been admitted to probate and record, according to the provisions of this title; and such wills shall, in all respects, be governed by the laws in force relating to other wills, not only as relates to the contest of the same, but in all other matters. [50 v. 297, § 51.]

Probate is *prima facie* evidence of due attestation, execution and contents, 12 O. S. 427.

RECORD OR PROBATE WHEN RECORD OF WILL DESTROYED.

§ 5949. **When record of will destroyed, authenticated copy of the will and probate thereof may be admitted to record.** When the record of any will has been or shall hereafter be destroyed, a copy of such will and the probate thereof may be recorded by the probate court of the proper county, whenever it shall be made to appear to the satisfaction of the court that said record has been destroyed, and whenever it shall further appear, by a certificate, under the hand and seal of the probate judge, or clerk of the court of common pleas of the proper county, that such copy is a true copy of the original will and the probate thereof. [65 v. 90, § 1.]

§ 5950. **An original will may again be admitted to probate.** When the record of any will has been, or shall hereafter be destroyed, as aforesaid, the original will may be again admitted to probate and record in the same manner provided for the probate of wills. [65 v. 90, § 2.]

§ 5951. **Or an authenticated copy of the will alone may be admitted to record.** The probate court of any

county, where the record of any will has been or shall hereafter be destroyed, may admit to record a copy of said will, whenever it shall appear that such copy produced for record bears the certificate of any probate judge or clerk of the court of common pleas, setting forth that the same is a true copy of the will, the record of which has been destroyed; provided, that nothing in this or the next two preceding sections shall be so construed as to affect the proceedings or extend the time for contesting the validity of any will, or for asserting any rights thereunder, and the record provided for in the preceding sections shall show that the original record was destroyed, and the time as near as may be, when the will was originally admitted to probate and recorded. [65 v. 90, § 3.]

§ 5952. Notice that copy has been admitted to record to be published, contest of same, and effect if not set aside. It is hereby made the duty of every probate judge, who shall admit to record any will or copy thereof, under the provisions of either the three preceding sections, immediately thereafter to give notice for three consecutive weeks, in two weekly newspapers of his county, if so many be published therein, or if not, in one newspaper published and of general circulation therein, stating the name of the person, the record of whose will has been destroyed, and the day when said record was supplied; and all persons interested in said record shall have the right at any time within five years from the making of said new record, to come into the probate court of the proper county, and contest the question whether the record thus supplied is the same as the record destroyed; and from all final orders and decrees of the probate court in such contest, either party may appeal to the court of common pleas, in such manner as appeals are now or hereafter may be provided for from the probate court; and if any person interested in said record shall, at the time such record is supplied, be under any legal disability, such person shall have the right to contest said record within two years from the removal of such disability; and such new record supplied, according to either of the three preceding

sections, shall, unless set aside in proceedings provided for in this section, have the same force, effect, and validity, as the original record. [65 v. 90, § 4.]

REVOCATION.

§ 5953. **How will expressly revoked or canceled.** A will shall be revoked by the testator tearing, cancelling, obliterating, or destroying the same--with the intention of revoking it--by the testator himself, or by some person in his presence, or by his direction; or by some other will or codicil, in writing, executed as prescribed by this title; or by some other writing, signed, attested, and subscribed, in the manner provided by this title for the making of a will, but nothing herein contained shall prevent the revocation implied by law, from subsequent changes in the condition or circumstances of the testator. [50 v. 297, § 39.]

Tearing, cancelling, etc.—In order to constitute a revocation by tearing, obliterating, cancelling or destroying, the sign or symbol of the attempt so to do must be apparent upon the instrument purporting to be a will, 10 O. S. 204. Cutting name out held sufficient revocation, 1 Curt. 768, tearing, 1 Redf. 451; tearing off signatures, Johns. 530, slight tearing, 6 Cow. 377; 4 Cow. 483; 2 Nott & M. 272; slight burning, 2 W. Bl. 1048 cf. 6 Ad. & El. 209; obliteration, 3 McCord 282; 7 Johns. 394; 58 Pa. St. 238. Erasures when not, 34 Barb. 140. Cutting out particular clause or name of particular legatee is a revocation *pro tanto*, 2 P. & D. 206; 401, but drawing ink lines through particular clause is not, 3 C. C. R. 110, and under a similar statute partial obliteration is construed not to have the effect of a revocation *pro tanto*, 88 N. Y. 377; 25 Hun. 537; see 61 Md. 478, *contra* under other statutes, 123 Mass. 102; 2 R. I. 94; 22 N. J. Eq. 463. Cancelling either duplicate an effective revocation, 11 Bull 231; 13 Ves. 310; 8 C. B. 724, unless testator has possession of both, 3 Hagg. 548. Drawing scroll through signature not a revocation, 60 Ia. 415. What constitutes destruction, 60 Ia. 415. Interlined legacies excluded, residue of will, etc., sustained, 17 Bull 243.

Intention to revoke necessary, otherwise there is no revocation, 50 Barb. 119; 1 Add. 4. Testator's declaration admissible as showing, 58 Pa. St. 238, or rebutting presumption of revocation, 134 Mass. 252, 258. See 63 N. H. 475, S. C. 5 Am. Prob. Rep. note p. 538; 16 Bull 109.

Presumption of revocation where will in testator's custody is found mutilated or partially destroyed, 3 Sw. & Tr. 81; 82 Ga. 156, but not when so found in another's custody, 2 Pa. St.

110; 8 Hagg. 568, or when will in testator's custody can not be found, but the presumption may be rebutted by contrary proof, 85 N. Y. 653; 87 Pa. St. 67; 14 Vt. 125; 8 Met. 487; 14 Ala. 474; 40 Conn. 587. Revocation may be shown by proving revocatory clause in lost will though no other part of it is remembered, 19 Bull 315.

By testator or some person in his presence, etc.—Dea & Sw. 290. See 45 Barb. 438; 11 Ired. 95.

Some other will or codicil, etc.—15 Hun. 410; 4 Wis. 254; 55 Md. 365; 23 N. J. L. 447, must be totally inconsistent, otherwise it will only revoke *pro tanto*, 45 Mich. 241; 1 Pick 535; 28 Pa. St. 23; 15 N. J. Eq. 359; 28 Vt. 274; 7 B. Mon. 290; 63 N. C. 209; 8 Cow. 56, or must expressly revoke prior will, Schouler § 417. A nuncupative will does not revoke a written one, 8 O. 144, nor does a codicil by implication, 3 O. S. 369. See 52 N. Y. 450; 55 Md. 365; 13 Gray 103, 108; 2 Jones Eq. 13; 17 Sim. 86; 8 Cow. 56; 9 Cush. 291. Whether destruction of will revokes codicil, see 2 Add. 116, 229; 1 Curt. 289; 8 P. D. 169; L. R. 1 P. & D. 72.

Some other writing signed, etc.—81 Pa. St. 246; 9 R. I. 434; 2 Bradf. 210; 1 Pick. 543; 3 Mac Arth, 153. See 37 Vt. 356; 2 Nott & McC. 272; 7 Harr. & J. 388; 60 Wis. 187, S. C. 4 Am. Prob. Rep. 137, note p. 147.

Subsequent changes in condition of testator, see §§ 5954 *et seq.* Divorce from wife does not revoke devise to her, 27 O. S. 298.

Alterations, in general require statutory execution in presence of witnesses, to operate, Schouler § 432, citing, 61 Md. 478; 55 Pa. St. 424; 4 Redf. 178. There must be a sufficient attestation of the will as altered, otherwise it stands as before, Id. citing, 7 Johns. 399; 42 Me. 72; 20 Minn. 245. Unattested and unexplained alterations presumed to have been made after execution, 5 Redf. (N. Y.) 544; 2 Demarest 160. See 3 Am. Prob. Rep. note p. 336; subject to rebuttal by contrary proof, see 72 Ala. 354; 16 Q. B. 747. Alterations made by a stranger after due execution without testator's knowledge do not affect validity of will in other respects, 91 Pa. St. 236. See as to effect of alterations, 61 Md. 478; S. C. 4 Am. Prob. Rep. 17, note p. 29. A will altered by testator after execution, if republished by a codicil which refers to it is valid and it may be shown by extrinsic evidence that the alterations were made prior to re-publication. 12 Bull 128. Interlineations after execution excluded, 17 Bul. 248.

§ 5954. What shall not be deemed a revocation. A bond, agreement, or covenant, made for a valuable consideration by a testator, to convey any property devised or bequeathed in any will previously made, shall not be deemed a revocation of such previous devise or bequest, either at law or in equity, but such property shall pass by such devise or bequest, subject to the same remedies on such bond, agreement, or covenant, for a specific performance or otherwise, against the devisees or legatees, as might be had by

law against the heirs of the testator, or his next of kin, if the same had descended to them. [50 v. 297, § 33.]

§ 5955. Charge or incumbrance not deemed a revocation. A charge or incumbrance upon any real or personal estate, for the purpose of securing the payment of money, or the performance of any covenant, shall not be deemed a revocation of any will relating to the same estate, previously executed; but the devises and legacies therein contained shall pass and take effect, subject to such charge or incumbrance. [50 v. 297, § 34.]

Charges on devise bind devisee accepting, 17 O. S. 288; 40 O. S. 591, but special fund must first be exhausted, *Id.* 4 O. S. 833; 41 O. S. 241. Charges are equitable liens and bind purchasers, 4 O. S. 445; 32 O. S. 358; 40 O. S. 27, see § 5967 *n.* Charge on land with power of sale gives purchaser good title, 23 O. S. 645.

§ 5956. Conveyance, etc., altering but not divesting estate, not a revocation unless, etc. A conveyance, settlement, deed, or other act of the testator, by which his estate or interest in property previously devised or bequeathed by him, shall be altered, but not wholly divested, shall not be deemed a revocation of the devise or bequest of such property, but such devise or bequest shall pass to the devisee or legatee, the actual estate or interest of the testator, which would otherwise descend to his heirs, or pass to his next of kin; unless, in the instrument by which such alteration is made, the intention is declared, that it shall operate as a revocation of such previous devise or bequest. [50 v. 297, § 35.]

The will attaches *pro tanto* to any part of the estate undisposed of and carries it to the devisees, 11 O. 287. Testator can not control descent of intestate property, 1 O. S. 279.

§ 5957. When provisions of instrument are inconsistent with terms of will—effect. But if the provisions of the instrument by which such alteration is made, are wholly inconsistent with the terms and nature of such previous devise or bequest, such instrument shall operate as a revocation thereof, unless such provis-

ions depend on a condition or contingency, and such condition be not performed, or such contingency do not happen. [50 v. 297, § 36.]

§ 5958. **Marriage of woman does not revoke.** A will executed by an unmarried woman, shall not be deemed revoked by her subsequent marriage. [50 v. 297, § 37.]

§ 5959. **Revocation by birth of child.** If the testator had no children at the time of executing his will, but shall afterward have a child living, or born alive after his death, such will shall be deemed revoked, unless provisions shall have been made for such child by some settlement, or unless such child shall have been provided for in the will, or in such way mentioned therein as to show an intention not to make such provision, and no other evidence to rebut the presumption or revocation shall be received. [50 v. 297, § 38.]

That testator survives the child does not revive the will, 9 O. S. 383. Under the act of 1824 it was held that the birth of testator's child after the probate of the will revokes it, 15 O. S. 324. Parol evidence admissible to show whether omission was intentional, 97 Mass. 439; 6 Wall 337, see 3 Gray 357; 106 Mass. 320.

§ 5960. **Destruction of second will not to revive first, unless, etc.** If, after the making of a will, the testator shall duly make and execute a second will, the destruction, canceling, or revocation of such second will shall not revive the first will, unless it appear by the terms of such revocation that it was his intention to revive and give effect to his first will; or unless, after such destruction, canceling, or revocation, he shall duly re-publish his first will. [50 v. 297, § 40.]

12 Bull 12; 134 Mass. 256.

§ 5961. **Child absent, reported dead, or born after will made to have portion of estate—how portion raised.** When a testator, at the time of executing his will, shall have a child absent and reported to be dead, or having a child at the time of executing the will, shall afterward have a child who is not provided for in the will, the absent child, or the child born after the execution of the will, shall take the same share of the

estate, both real and personal, that he would have been entitled to if the testator had died intestate; toward raising which portion the devisees and legatees shall equally contribute, in proportion to the value of what they shall respectively receive under the will, unless, in consequence of a specific devise or bequest, or of some other provisions in the will, a different apportionment among the devisees and legatees shall be found necessary, in order to give effect to the intention of the testator, as to that part of the estate which shall pass by the will; provided, that if such child, supposed to be dead at the time of the execution of the will, shall have a child or children provision for whom is made by the testator, the other legatees and devisees shall not be required to contribute, but such child, supposed to have been dead, shall take the provision made for his child or children by the testator, or such part thereof as the circumstances of the case, in the opinion of the court of proper jurisdiction, may think just and equitable. [50 v. 297, § 41.]

Common pleas has jurisdiction, 22 O. S. 190.

§ 5962. **Advancements to be taken into account in such settlement.** In settling the extent of the claim of any child, as provided for in the preceding section, any portion of the estate of the testator received by a party interested, by way of advancement, shall be deemed a portion of the estate, and charged to the party who has received the same. [50 v. 297, § 42.]
§ 4169 *et seq.*

ELECTION BY WIDOW.

§ 5963. **Citation to widow to make her election.** If any provision be made for a widow, in the will of her husband, it shall be the duty of the probate judge, forthwith after the probate of such will, to issue a citation to such widow to appear and make election, whether she will take such provision, or be endowed of the lands of her said husband and take her distributive share of his personal estate; and said election shall be made within one year from the

date of the service of the citation aforesaid; provided, that if a proceeding to contest the validity of any will be commenced within said year, said widow shall be entitled to make such election within three months after such proceedings shall have been finally disposed of, sustaining such will; but she shall not be entitled to both, unless it plainly appears by the will to have been the intention that she should have such provision in addition to her dower and distributive share [77 v. 307; 55 v. 36, § 43]

Her year in which to elect begins from service of citation, 34 O. S. 164. The act does not apply to foreign wills, 21 O. S. 56. A divorced widow can not elect, 27 O. S. 298. Where dower is barred by jointure election is not necessary, 34 O. S. 164, but her share of intestate property is not affected by her election, 14 O. S. 505. Her election must be made if bequest is not in lieu of dower, 18 O. S. 95. Where a widow without following the forms prescribed by law for making her election to take under the will sets up no claim for dower, but *actually* and in *fact* takes under the will, and for a series of years has the use and occupancy of the property devised, she is barred of her dower and estopped to deny her election to take under the will, 6 O. S. 481. So also where the widow with the full knowledge and acquiescence of the heirs and devisees of the testator sets up no claim for dower but actually takes possession and has the use and occupancy of the property devised to her under the will for a series of years; after the probate of the will the heirs or devisees are estopped to deny the election of the widow to take under the will, 20 O. S. 184; 33 O. S. 213. And where the provisions of the will include dower, if the widow actually accepts the provisions made for her, and then dies without making the statutory election in court, and without being cited to appear in court for that purpose, she will be held to have taken under the will, and her representatives will be entitled to no part of the personal estate except that given to her in the will, 19 O. S. 490. She is not estopped by her election from claiming as heir, 16 O. S. 333. When she elects to be endowed of the lands of her husband instead of under the will, the devisees who are prejudiced by such election are equitably entitled to compensation out of the rejected provisions made for her in the will, 21 O. S. 56; 2 D. 282. Her election formally made and entered upon the journal at the instance of the widow can not afterward and within a year from the service of a citation be set aside at pleasure, 11 O. S. 386. Provision by deed in lieu of dower may be waived by her and dower claimed, 39 O. S. 642. Second marriage forfeits her right if the will so provides, 19 O. S. 24; see generally, 45 O. S. 203; 40 O. S. 543.

§ 5964. **Election or non-election, effect.** The election of the widow to take under the will, shall be made by her in person, in the probate court of the proper county, except as hereinafter provided; and on the

application by her to take under the will, it shall be the duty of the court to explain to her the provisions of the will, her rights under it, and by law in the event of her refusal to take under the will. The election of the widow to take under the will shall be entered upon the minutes of the court; and if the widow shall fail to make such election, she shall retain her dower, and such share of the personal estate of her husband as she would be entitled to by law in case her husband had died intestate, leaving children. If she elect to take under the will, she shall be barred of her dower and such share, and take under the will alone, unless as provided in the next preceding section; provided, further, that said election by the widow to take under the will shall not bar her of the right to remain in the mansion of her husband, and receive one year's allowance for the support of herself and children, as provided by law, unless the will shall expressly otherwise direct. [57 v. 30, § 44.]

Probate judge need not advise her as to her rights as heir. 16 O. S. 358. The entry of an election by a widow need not show affirmatively that the judge had explained to her the provisions of the will, etc., for in the absence of an averment or proof to the contrary, such explanation will be presumed. 11 O. S. 386. Such election when made and recorded can be vacated only by petition to the common pleas or other court having general equity jurisdiction, *Id.* Her election must be made in person and with full knowledge on her part, 87 O. S. 460. Her representatives can not elect for her. *Id.* She can not have both bequest and dower. 83 O. S. 572. She can claim year's support, etc., though the will expressly state that the provision made for her therein shall be in lieu of dower and all other claims against the estate of testator. 3 O. S. 369. She may either personally occupy mansion house or rent it as she chooses. 28 O. S. 134. See § 6040 and note, § 6043.

§ 5965. If widow unable to appear or non-resident of county, how election taken. If the widow of the testator shall be unable to appear in court by reason of ill-health, or is not a resident of the county in which said election is required to be made, it shall be the duty of the probate court, on an application made in her behalf, to issue a commission, with a copy of the will annexed, directed to any suitable person, to take the election of said widow, to accept the provisions of said will in lieu of the provisions made for her by law; and it

shall be the duty of the court in said commission to direct such person to explain to said widow her rights under the will, and by law. [50 v. 297, § 45.]

§ 5966. **How election made for insane or imbecile widow.** If the widow of any testator shall be unable to make an election by reason of insanity or imbecility of mind, it shall be the duty of the probate court, so soon as the facts come to the knowledge of the court, at any time within one year after the death of the testator, to appoint some suitable person to ascertain the value of the provision made by the testator for her in his will, in lieu of the provisions made by law, and the value of her rights by law in the estate of her husband; and if the court shall be satisfied, on the coming in of the report of the person appointed to make such investigation, that the provision made by testator for his widow, as aforesaid, in his will, is more valuable and better for her than the provision by law, said court shall enter upon its minute book, an election for said insane or imbecile widow, that she, by virtue of the proceeding herein provided for by the court, elects to take under the will of her husband, which election, when so made, shall have the same force and effect as an election made by one not under such disability. [50 v. 297, § 46.]

CONSTRUCTION AND OPERATION.

§ 5967. **Rights of purchaser without knowledge of foreign will—No contest of foreign will—Effect, if set aside in foreign State.** The title of any *bona fide* purchaser, without knowledge of a will, to any land situated in this state, derived from the heir or heirs of any person not a resident of this state at the time of his or her death, shall not be defeated by the production of the will of such decedent, unless such will shall be offered for record in this state within four years from the final probate and establishment of such will in the state or territory in which it may have been admitted to probate: provided, that the rights of infants, married women or persons of insane mind and memory, shall not be concluded by any delay or failure to

record such will in this state, until two years after their respective disabilities are removed; provided, further, that no proceeding shall be had in this state to contest a will executed and proved according to the law of any state or territory of the United States, or of any foreign country, relative to property in this state; but if the said will shall be set aside in the state, territory or country in which it is executed and proved, the same shall be held of no validity in this state as to all persons claiming under said will, with notice of the same being set aside, as aforesaid; and as to all other persons, from the time that an authenticated copy of the final order or decree setting the same aside, is filed in the office of the probate judge of the county in which said will is recorded. [50 v. 297, § 52.]

This section has reference to such foreign wills as, when made and proved in conformity to the foreign law, are by the laws of this state, valid to dispose of property therein situated, and does not apply to cases arising under former laws, of wills, valid where made but inoperative here because not executed in conformity to our law. 17 O. S. 171.

Construction.—A will in general speaks from the death of testator, 29 O. S. 488; 31 O. S. 657; 41 O. S. 113. A will of personalty is governed by the law of the testator's last domicile, 8 O. 144; a will of realty by the law of its location, 21 O. S. 56, (see 14 O. 368) in force at the date of death, 2 D. 444.

Rules for construing the language of a will are less rigid than in regard to other instruments, 15 O. S. 108. It is not necessarily to be viewed technically and with strict grammatical accuracy, but sensibly and liberally in order to give effect to intention, *Id.* 4 O. S. 351; 17 O. S. 597; 24 O. S. 416. The sole purpose of the court should be to carry out the intention of the testator, 25 O. S. 477; that is the controlling consideration, 3 O. 157; 15 O. 559; 2 O. S. 380; 1 O. S. 279; 32 O. S. 1; 18 O. S. 227. Such intention must be ascertained from the words contained in the will, 25 O. S. 477. Words contained in a will if technical must be taken in their technical sense, *Id.* if not technical in their ordinary sense, *Id.*; 32 O. S. 1, unless it appear from the context that they were used by the testator in some secondary sense, 25 O. S. 477.

The entire will must be construed as a whole and effect given to every part if possible, 17 O. 171; 25 O. S. 477, 668; 17 O. S. 597; 18 *Id.* 95; 3 O. 157. A later clause in a will must be deemed to affirm, not to contradict an earlier clause, if such construction can fairly be given, Schouler on Wills, § 474; for in construing doubtful language that interpretation should be preferred which gives consistency to the whole will, rather than one which works inconsistency, *Id.* and the rule that the last clause shall govern, should be the last rule applied, 2 O. S. 380.

Repugnancy.—Since a will is to be expounded favorably, 3 O. 157; 19 O. 328, when it is open to two constructions the one consistent and the other repugnant to law, or one which will give effect to the whole instrument and the other will destroy a part, the former must always be adopted, 14 O. S. 251; 33 O. S. 128. Repugnancies should be reconciled if possible, 19 O. S. 490; 2 O. S. 380. A repugnancy which will justify the rejection of a word or clause from a will must arise from the face of the will itself and can not be created or supplied by extraneous proof, 20 O. S. 550. Such a repugnancy however, need not necessarily arise between the word or clause to be rejected and some other distinct word or clause, but may consist in the fact that the word or clause to be rejected is in conflict with the general tenor and scope of the will including as well its implications and omissions as its positive provisions, *Id.* See 10 O. S. 307; 13 O. S. 95; 19 O. S. 490; 20 O. S. 550; 21 O. S. 527; 37 O. S. 126; 3 O. 498.

Intestacy never presumed.—"It is a settled rule of construction that a testator is never presumed to intend to die intestate as to any part of his estate to which his attention seems to have been directed; and a court of equity will put such construction upon equivocal words as to prevent such a result," 3 O. S. 369, 374; 17 O. S. 396; 25 O. S. 668; 34 O. S. 352; 19 O. 328.

Precedents.—"Wills are so unlike in their terms and the circumstances surrounding a testator so unlike in their facts that the decision in one case is not apt to aid in the determination of subsequent cases," 44 O. S. 530, see 17 O. 171; 15 O. S. 703.

Codicil and Will to be construed together as part of one instrument, 3 O. S. 369; 16 O. S. 586; 20 O. 310.

Construction of words.—"Debts" include equitable claims, 44 O. S. 333. "Heirs," construed children, 10 O. S. 307; 2 D. 460; 26 O. S. 409, construed legatees, 3 O. S. 369; 43 O. S. 213; construed "next of kin" and not wife, 33 O. S. 572; construed as a word of limitation and not of purchase, 32 O. S. 1; 33 O. S. 128. "Issue" does not include bastards, 11 O. S. 131. "Now living" does not include posthumous child, 16 O. S. 29. "Die without issue," construed without issue living, 6 O. S. 563; 12 O. S. 320. "Unmarried," that person never had been married, 31 Eng. Law & Eq. 547, but see 10 Bull 339. "Surviving children," means surviving at testator's death, 29 O. S. 488. "Or" and "and," convertible, 2 O. S. 241. "All my property" includes realty, 4 W. L. M. 627. "Household furniture" includes portraits, 2 A. L. R. 489. Right to "have a home" does not include right to maintenance, 19 O. 282. "Sons and daughters," do not include granddaughters, 12 Bull 135. "Moneys" 12 Bull 167. Bequest to "my wife," former wife living, second wife intended, 13 Bull 112. "Death" means natural, not civil death, 14 Bull 153. "House," carries land, 4 Pa. St. 93. "Farm," 40 N. J. L. 402; 9 East. 448. "Mortgages" 5 De G. & S. 644; 6 Mad. 371. "Effects," personalty only unless contrary intent, 2 M. & S. 448, may include land, 89 N. C. 447. "All the residue" passes real and personal property, 30 Mo. 414; 1 Wash. 45. "Relatives," those who would take under the statutes of distribution or descent. Schouler § 537; 11 S. & R. 103. See 60 Md. 198; 3 Am. Prob. Rep. note, p. 537. "Heirs" may include grandchildren, 38 O. S. 328. "All my worldly goods" does not include real estate, 78 Mo. 212. Husband not "heir" or "next of

kin" of wife, 106 Pa. St. 176; 4 Am. Prob. Rep. note p. 179. Widow not "heir" of husband, 106 Pa. St. 216. "What remains," "if anything remaining," 4 Am. Prob. Rep. note p. 271. "Children," "grandchildren," 94 Ind. 403. "Ready money," 92 N. Y. 228. "Legacy," "Devise," 3 Am. Prob. Rep. 176. Bonds included under "bank stock," 90 N. C. 629. "My next of kin who may be needy," 13 Bull. 441. "Household effects, books and papers," etc., held to include note and savings bank book, 14 Bull. 29.

See §§ 5913, 5915, *n*.

Conditions restraining alienation void, 36 O. S. 506; 11 Bull. 67, 71; 207. Condition excluding testator's "heir, who goes to law to break his will" from any share of his estate valid. Forfeited legacy passes to residuary legatees without express words, 19 O. S. 546; see 3 Am. Prob. Rep. note, p. 210. Limitations preferred to conditions in doubtful cases, 6 O. S. 480; 24 O. S. 416; 2 O. S. 350. Condition that widow shall not marry, valid, 91 Ind. 266; 97 Ind. 570; 35 Pa. St. 100; 11 Bull. 50; or widower, 1 Ch. D. 339; 35 Pa. St. 100; 59 Md. 231; 8 Am. Rep. note 371. And a condition to marry or not to marry a certain person or class of persons, 4 D. F. & J. 524; 23 N. J. Eq. 229; 11 Ch. D. 959. Or without consent of specified person, 10 Ves. 230. Condition in general restraint of marriage void, 10 Gray 581. As to beneficiaries' connection with priesthood, 4 Am. Prob. Rep. 303. Conditions void as against public policy, 4 Am. Prob. Rep. 452.

Evidence.—Parol evidence can not be admitted to alter, contradict or control the words of a will, 18 O. 247. Wills are to be construed from the written language of the instrument, and not by extrinsic evidence, 20 O. 492; but extrinsic evidence may be received to show the circumstances under which a will was made. The testator having used the phrase, "my two farms," such evidence may be introduced to show the situation of the land and the manner in which it had been used and treated in order to ascertain whether a disconnected piece of woodland was, in fact, a part of one of the "two farms," so as to pass under the devise, 32 O. S. 813. Where there is another person bearing the same name as the legatee, 16 L. J. Ch. 434; 2 M. & W. 129, or another piece of property of the same description as that devised, Green Ev. § 290, evidence is admissible to show the person or property intended. Latent ambiguity as to person of devisee, see 3 Am. Prob. Rep. note, p. 558. Parol evidence admissible to prove intention of testator, 11 Bull. 127. Declarations by a testator to the scrivener of the will with proof of the provisions of a will of the testator from which the will in question was copied are not admissible to explain conflicting provisions of the will itself, 3 C. C. R. 152.

Precatory Words.—A bequest made absolutely to a husband with the declaration that testatrix had full faith that he would properly provide for the niece and nephew of her deceased brother, whom "we have undertaken to raise and educate," the children being in frail health, will create a precatory trust for the benefit of these children, 19 Bull. 162. See generally, 4 Am. Prob. Rep. note p. 55; 8 *Id.* note, p. 538; 12 Bull. 252.

Residuary Clause.—Construction of generally, 39 O. S. 849. Distribution *per stirpes* or *per capita*, 10 Bull. 318. In case of death of children, leaving no heirs, etc., 40 O. S. 858. Devise clothing executor with power of sale, 11 Bull. 145, 177. To

grandchildren of residuary estate, in case of death without issue, to other grandchildren, 41 O. S. 113. By what words devisees take *per capita*, 43 O. S. 213.

Charges.—"The personal estate is the primary fund for the payment of debts and legacies. If the testator, therefore, gives a legacy without specifying who shall pay it or out of what fund it shall be paid, the presumption is that he intended it should be paid out of his personal estate; and if that is not sufficient, the legacy fails;" 7 Paige 421 cited in 17 O. S. 568. See 19 Bull 271. Charges on devise bind devisee accepting, 17 O. S. 288. See 40 O. S. 27; § 5955, *n.* What necessary to constitute a charge on land, 95 Pa. St. 305; 3 Am. Prob. Rep. note, p. 25. Dower in land charged with payment of legacy, 39 O. S. 172. Limitation of action for recovery of unpaid installments of legacy charged on land, 40 O. S. 27, see 11 Bull 247.

Discretion of executor, etc.—Where the payment of a legacy depends upon the discretion of the executor of a will, the legatee can not recover it for himself and it can not be subjected to the payment of his debts, 9 Bull 292. Discretion as to direction of sale, 13 Bull 85, as to payment of widow's allowance, 14 Bull 29. Power to sell can not be delegated, 37 O. S. 282.

Election.—Where a devise of real estate is upon condition that the devisee shall pay a sum of money for the use of other beneficiaries, the acceptance by the devisee of a legacy, given without condition, by a separate distinct and independent clause of the will, does not of itself constitute an election to take such devise, 8 C. C. R. 119. Generally 3 Am. Prob. Rep. note p. 497. Devisee's right of does not pass to creditor, 31 O. S. 144.

Limitations over of real or personal property by way of executory bequest or devise valid and pass the fee, 12 O. S. 320; 37 O. S. 353, see 33 O. S. 99; 38 O. S. 538.

Provision for adopted daughter who subsequently married and was supported by husband held could not be claimed, 39 O. S. 535.

Provision for employe.—Employe whose services and future salary are provided for in the will not a devisee, 41 O. S. 236.

Life Estates and remainders in shares of stock, 5 Am. Prob. Rep. 260, note p. 270. Regular cash dividend declared during continuance of life estate belong to life tenant. It is income and not capital, *Id.* 14 Ves. 66; 11 Leigh (Va.) 595, and it is not material when they were earned, 73 Me. 570; L. R. Eq. 283; 115 Mass. 478. Generally 3 Am. Prob. Rep. note p. 436. Life estate given by will is not enlarged to a fee by a power of sale coupled with it unless such appears to have been the intention of the testator, 12 Bull 135. Devise to wife in trust for herself for life with remainder over, 14 Bull 402. A devise of lands to "A" for and during the term of his natural life "with a gift over upon his dying under twenty-one," will not be construed by implication as a fee simple in "A," 1 C. C. R. 362.

Power of appointment.—Where a testator invests his widow with a life estate in his property with power to dispose of remainder to his heirs, an attempted appointment of it in such manner as to secure to herself a substantial benefit from its disposition, not authorized by the testator, is an abuse of such power of appointment and void, 44 O. S. 237. Power of appointment to be exercised by will can not be exercised by deed.

Nor can the grantee of such power lawfully exercise the same for a valuable consideration, 18 Bull 2.

Miscellaneous.—Devise of fund by member of co-operative insurance company to a woman to whom he was engaged to be married at the time of his death held invalid, 15 Bull 357, to one as husband to whom testatrix was not legally married held valid, 15 Bull 120. Testator can not establish tribunal to determine "differences" arising under his will to the exclusion of the proper court, 15 Bull 397. Bequest by mother to married daughter of income of estate providing that in case she be "left a widow or for any other cause should cease to be the wife of the said A", then all the estate should be given to the said daughter and subject to her control, valid, 15 Bull 179. A bequest on condition that the legatee shall remain unmarried until she becomes twenty-one years of age is valid, 19 Bull 46.

§ 5968. Devise for life, remainder to heirs in fee. When lands, tenements, or hereditaments are given by will, to any person for his life, and after his death to his heirs in fee, or by words to that effect, the conveyance shall be construed to vest an estate for life only, in such first taker, and a remainder in fee simple in his heirs. [50 v. 297, § 53.]

This section abolishes as to wills the rule in Shelley's case which gave the first devisee the fee. Before the act of 1840 (Swan's stat. 1841 p. 999) of which this section is a re-enactment the rule in Shelley's case was adopted in this State, 5 O. 464; 12 O. 287, unless contrary to the plain intent of testator, 15 O. 559, or where "children" were named or meant instead of heirs, *Id.*; 2 D. 604; 1 C. S. C. R. 288. It is a mistake to suppose that the effect of the rule ever was to convert a fee tail into a fee simple, 27 O. S. 86. See generally 25 O. S. 283; 32 O. S. 1; 33 O. S. 128. The rule is not abolished as to deeds, 1 Bull 58.

§ 5969. Property acquired subsequent to making of will passes. Any estate, right, or interest, in lands or personal estate or other property acquired by the testator after the making of his will, shall pass thereby, in like manner as if held or possessed at the time of making the will, if such shall clearly and manifestly appear by the will to have been the intention of the testator. [50 v. 297, § 54.]

Land held by equitable title passes, 4 O. 115. At common law after acquired realty did not pass by the devise. It does by our law if clearly expressed, 14 O. S. 251. What words in a will are sufficient to indicate an intention to devise after acquired realty; see 5 Am. Prob. Rep. note p. 492.

§ 5970. When whole estate of deviser in land to pass by the devise. Every devise of lands, tenements, or

hereditaments, in any will hereafter made, shall be construed to convey all the estate of the devisor therein, which he could lawfully devise, unless it shall clearly appear by the will that the devisor intended to convey a less estate. [5 v. 297, § 55.]

No words of perpetuity are essential in a will to pass an estate of inheritance. A fee passes without the word heirs, 6 O. S. 481; 12 O. S. 320; 37 O. S. 353. A devise of real estate without words of limitation, vests in the devisee a fee simple though there is a devise of the remainder over, 14 Bull 386.

§ 5971. Devise or bequest not to lapse by the death of devisee or legatee. When a devise of real or personal estate is made to any child or other relative of the testator, if such child or other relative shall have been dead at the time of the making of the will, or shall die thereafter, leaving issue surviving the testator, in either case such issue shall take the estate devised in the same manner as the devisee would have done, if he had survived the testator; or if such devisee shall leave no such issue, and the devise be of a residuary estate to him or her, and other child or relative of the testator, the estate devised shall pass to, and vest in such residuary devisee surviving the testator, unless a different disposition shall be made or required by the will. [63 v. 47, § 56.]

§ 5972. When real estate undevised shall be applied to pay debts instead of personalty. When any part of the real estate of a testator shall descend to his heirs by reason of its not being devised or disposed of by his will, and his personal estate shall be insufficient for the payment of his debts, the undevised real estate shall be first chargeable with the debts, in exoneration, as far as it will go, of the real estate that is devised, unless it shall appear from the will, that a different arrangement of his assets, for the payment of his debts, was made by the testator; in which case they shall be applied for that purpose in conformity with the provisions of the will. [50 v. 297, § 57.]

§ 5973. Contribution when devised or bequeathed property taken to pay debts. When any estate, real or

personal, that is devised shall be taken from the devisee for the payment of the debts of the testator, all the other devisees and legatees shall contribute their respective proportions of the loss to the person from whom the estate is taken, so as to make the loss fall equally on all the devisees and legatees, according to the value of the property received by each of them, excepting as provided in the following section. [50 v. 297, § 58.]

§ 5974. **Except when will otherwise provides.** If, in such case, the testator shall, by making a specific devise or bequest, have virtually exempted any devisee or legatee from his liability to contribute, with the others, for the payment of the debts, or if he shall, by any other provision in the will, have prescribed or required any appropriation of his estate, for the payment of his debts, different from that prescribed in the preceding section, the estate shall be appropriated and applied in conformity with the provisions of the will. [50 v. 297, § 59.]

§ 5975. **But whole estate liable for debts.** Nothing contained in the two preceding sections shall impair or in any way affect, the liability of the whole estate of the testator for the payment of his debts; but the provisions of these sections shall apply only to the marshaling of the assets as between those who hold or claim under the will. [50 v. 297, § 60.]

Heirs and devisees hold the land subject to ancestor's debts, 8 O. 217; 9 O. 197. Purchaser takes land charged with ancestor's debts, 6 O. 227. Creditors must first exhaust their remedy against the personal representatives before they can have recourse to lands in the hands of purchasers from the heirs, 8 O. 217.

§ 5976. **Portion of child born after execution of will or supposed to be dead, or of witness subject to contribution.** When any part of the estate of the testator descends to a child born after the execution of the will, or to a child absent and reported to be dead, or to a witness to a will who is a devisee or legatee, such estate (and the advancement made to such a child or witness) shall, for all the purposes mentioned in the three preceding sections, be considered as if it had been devised to such child or witness; and he shall

accordingly be bound to contribute with the devisees and legatees, as before provided, and shall be entitled to claim contribution from them accordingly. [50 v. 297, § 61.]

§ 5977. If any liable to contribute are insolvent, etc., how others to make up deficiency. When any of the persons who are liable to contribute toward the discharge of such debt, according to the provisions contained in the four preceding sections, shall be insolvent or unable to pay his just proportion thereof, the others shall be severally liable to each other, for the loss occasioned by such insolvency, each one in proportion to the value of the property received by him, from the estate of the deceased; and if any one of the persons so liable shall die, without having paid his proportion of such debt, his executors and administrators shall be liable therefor, in like manner as if it had been his proper debt, to the extent to which he should have been liable if living. [50 v. 297, § 62.]

5978. How contribution enforced. All cases arising under this chapter, in which devisees or legatees may be required to contribute to make up the share of any child born after the execution of the will, or of a child absent and reported to be dead, or of a witness to the will, or in which contribution is to be made among devisees, legatees and heirs or any of them, may be heard and determined in a single action. [50 v. 297, § 63.]

§ 5979. Order to sell land to pay debts—Not affected, etc. Nothing in the foregoing sections contained, shall prevent the court, when a sale of lands aliened or unaliened, by a devisee or heir is ordered for the payment of the debts of the estate, to make such order and decree for the sale of any portion of the aliened or unaliened land, as may be equitable between the several parties and also to make such order of contribution, and such further order and decree as will fully settle and adjust the various rights and liabilities of the parties, which arise by reason of the alienation or the order of sale or otherwise. [50 v. 297, § 64.]

§ 5980. Estate directed or devised to be sold by executors, etc., failure of executors to act, who may sell. When a last will and testament is admitted to probate, or a will made out of this state is admitted to record as hereinbefore provided, and any lands, tenements or hereditaments are given or devised by such will to the executors therein named, or any of them, to be sold or conveyed, or such estate shall be thereby ordered to be sold by such executors, or any of them, and one or more of the executors so named die, refuse to act or neglect to take upon themselves the execution of the will, then all sales and conveyances of said estate by the executor or executors who took upon himself or themselves in this state the execution of the will, or the survivor or survivors of them, shall be equally valid as if the residue of the executors had joined in the sale and conveyance; but if none of the executors named in such will take upon themselves the execution thereof, or if all the executors who take out letters testamentary, die, resign, or be removed before the sale and conveyance of such estate or die, resign, or be removed after the sale and before the conveyance is made, the sale or conveyance or both shall be made by the administrator with the will annexed. [66 v. 4, § 65.]

Where a will confers power upon an executor to sell lands, it will be so construed as to carry out the intention of the testator, 17 O. 171, and although one executor can not purchase land of his co-executors, yet such a sale may be confirmed by the subsequent assent and ratification of the heirs, 10 O. 117. The executor and not the heir is entitled to possession when the will empowers him to dispose of it, 3 O. 321; 17 O. 171, but his power under the will ceases on his resignation and a deed made by him afterward of land sold by him while in office and before the purchaser is entitled to a deed conveys no title, 32 O. S. 358. When power to sell includes power to mortgage, 62 Tex. 642; 4 Am. Prob. Rep. 81 note p. 90, see *Id.* p. 575.

TESTAMENTARY TRUSTEES.

§ 5981. Trustees appointed by will to give bond, unless, etc. Every trustee appointed in any will shall, before entering upon the discharge of his duty as such trustee, execute a bond, with freehold sureties, payable to the state, in the probate court of the

county in which any such will may be admitted to probate, to the satisfaction of said court, conditioned for the faithful discharge of his duties as such trustee; provided, that when by the terms of any will, the testator shall express a wish that his trustee may execute the trust without giving bond, the court admitting the will to probate, may, at its discretion, grant permission to the trustee to execute the trust with or without bond, as may seem expedient; and when granted without bond, the court may, at any subsequent period, upon the application of any party interested, require bond to be given; and provided, further, that the court upon the application of any party interested, may, if deemed necessary, require a new or additional bond at any time before the completion of the trust. [62 v. 61, § 2.]

It is a well settled rule in equity that a trustee is not permitted to so manage the subject of his trust as to make profit or gain therefrom for himself, for the beneficiaries in the trust have a right to expect and require the exercise of his best judgment, care and diligence on their behalf, and the gains resulting therefrom inure to their sole benefit. And what such trustee may not do directly, he is not permitted to do through the intervention of an agent or attorney; and it makes no difference whether such agent or attorney acts for the trustee solely or for him and others, with a view to joint profit; for what he can not do singly, the policy of the law will not permit him to participate in doing, 32 O. S. 532. Trustee can not delegate to another discretion to sell securities and change investments with which he was vested by the terms of the will, 19 Bull 198, see § 5984 n. Note and mortgage given by trustee under will for trust funds which he wrongfully converted to his own use, held to enure to beneficiaries, 40 O. S. 400.

§ 5982. Id. In case of trusts heretofore created by will. In all trusts heretofore created by will and not fully discharged, the probate court, on the petition of any person interested, and after notice to the trustee, shall, where not otherwise directed in the will and deemed unnecessary by the court, require a bond as provided in the next preceding section. [62 v. 61, § 2.]

§ 5983. Removed on failure to give bond. If any trustee aforesaid shall not give bond within such time as shall be ordered by the court, he shall be removed from his trust, or be considered to have

declined it, as the case may be; and some other person may be appointed in his stead, upon giving the required bond. [62 v. 61, § 3.]

§ 5984. Separate bond from each trustee or joint bond. When two or more persons shall be appointed trustees by any will, the probate court may take a separate bond from each, with sureties, or a joint bond from all, with sureties. [62 v. 61, § 4.]

When a loss accrues to a trust fund through the default of one of five trustees appointed by will, his co-trustees will not be held responsible for such loss, if they have acted in good faith and exercised vigilance over the fund which a man of ordinary prudence would exercise over his own property, 18 O. 500; but when trustees authorize one of their number to receive and control the trust fund and are negligent in taking security and looking after the fund, and it is lost by the defalcation of the trustee having such control, all the trustees are liable, 15 O. 593, see 93 N. Y. 104. When a trustee acting in good faith without negligence and in the usual course of business deposits trust funds in a reputable banking house to his credit as such trustee and not mingled with his own funds, he is not liable if they are lost by the failure of the bank, 3 C. C. R. 84; see 84 O. S. 25, 32 (justice of the peace); 1 C. S. C. R. 327.

§ 5985. Surviving trustee may execute trust. When two or more trustees are appointed by will, to execute a trust, and one or more of them die, decline, resign or are removed, the survivors or remaining trustees or trustee may execute the trust, unless the terms of the will express a contrary intention. [50 v. 297, § 66.]

§ 5986. When probate judge may appoint person to execute a trust. If any testamentary trustee shall die, decline to accept, resign, become incapacitated, or be removed, and such will has not provided for the contingency of the death, incapacity or refusal of such trustee or trustees to accept or execute the trust, the probate court having probate of said will may appoint some suitable person or persons to execute the trust according to the will, who shall give bond with security, as provided herein. [50 v. 297, § 67.]

39 O. S. 29.

§ 5987. Trusts created by foreign will. Trusts created by a will made out of this state, and relating to lands situated in this state, may, after the will is duly

admitted to record in this state, be executed as hereinafter provided. [50 v. 297, § 68.]

§ 5988. Id. Trustee named in foreign will to give bond. If a trustee is named in such foreign will, he may execute the trust, upon giving bond to the state of Ohio, in such sum and with such sureties as shall be approved by the probate court of the county in which said lands, or any part thereof, are situate, conditioned to discharge with fidelity the trust reposed in him: provided, that when the testator in the will naming the trustee, shall have ordered or requested that bond should not be given by said trustee, the bond shall not be required, unless from a change in the situation or circumstances of the trustee, or for other sufficient cause, the court of probate shall think proper to require it. [50 v. 297, § 69.]

§ 5989. How trustee appointed by foreign court may execute a trust. If a trustee has been appointed by a foreign court according to the laws of the foreign jurisdiction, he may execute the trust upon giving bond as provided in the preceding section, and satisfying the probate court of the county in which such lands, or any part of them, are situate, by an authenticated record of his appointment, that he has been duly appointed trustee to execute the trust. [50 v. 297, § 70.]

§ 5990. Probate court may appoint a trustee under a foreign will. The probate court of the county where the property affected by the trust is situated, may, when necessary, on application, by petition of the party or parties interested, appoint a trustee to carry into effect a trust created by a foreign will; which trustee, before entering upon his trust, shall give bond with such security, and in such amount, as such court shall direct. [50 v. 297, § 71.]

NUNCUPATIVE WILLS.

§ 5991. Nuncupative will, how made and proved. A verbal will, made in the last sickness, shall be valid in respect to personal estate, if reduced to writing, and subscribed by two competent disinterested wit-

nesses, within ten days after the speaking of the testamentary words; and if it be proved by said witnesses, that the testator was of sound mind and memory, and not under any restraint, and called upon some person present, at the time the testamentary words were spoken, to bear testimony to said disposition as his will. [50 v. 297, § 74.]

Form of nuncupative will.—In the matter of the nuncupative will of A. B. deceased. On the sixth day of October A. D. 188-, A. B. being in his last sickness, at his residence number—street in Cincinnati, Hamilton county, Ohio, in the presence of the subscribers did declare his last will concerning the disposition of his property as follows: I give my watch to C. D. I give one thousand dollars to E. F. I give all the rest of my personal property to G. H. At the time the said A. B. stated the foregoing as his will, he was of sound mind and memory and not under any restraint; and he at that time called upon us to bear testimony to said disposition as his will.

Reduced to writing by us, this 15th day of October A. D. 1888.
(Signed)

State of Ohio, ————county, ss. Before me ————Judge [or Deputy Clerk] of the Probate court of ————county, personally appeared I. J. and K. L. who being duly sworn say that they were present on the sixth day of October 1888 at the residence of A. B. number ————street in Cincinnati, Hamilton county, Ohio and did hear A. B. utter what is specified in the foregoing writing: that he was at that time of sound mind and memory, and not under any restraint, and that he, at the time the testamentary words were spoken called upon them to bear testimony to said disposition as his will, and that said A. B. was then in his last sickness to the best of their knowledge and belief.

(Signed)

Sworn and subscribed before me this 16th day of October, A. D. 1888. ————Judge [or Deputy Clerk] Probate court ————county, Ohio.

Notes.—A nuncupative will is an oral will declared by a testator before witnesses and afterwards reduced to writing. Schouler on Wills, § 360. It must be made in the "last sickness" 90 Johns. 503; 33 Md. 569; 21 Pa. St. 296. It is of no force therefore, should testator recover, or recover sufficiently to be able to execute a written will, *Id.* cf. 2 Ala. 239. The statute of 1824 (2 Chase 1306) was construed to confer the right to dispose of real estate by such will, 12 O. S. 381; 10 O. 462. A nuncupative will must contain substantially the words spoken, 34 O. S. 38. Directions as to distribution are not sufficient, 16 O. S. 586. It does not revoke a duly executed written will, 8 O. 144. It must be proved that testator "called upon some person present at the time" etc., 2 C. C. R. 298.

Probate of nuncupative will refused when testator did not die until nine days after making it, 42 N. J. Eq. 625 s. c. 5 Am.

Probate Reports: Following cases cited in note p. 391. Probate of nuncupative will refused when testator did not die until two months after, 10 Tex. 120; when he survived thirty days, 42 Ga. 361; nine days, 4 Rawle 46 s. c. 26 Am. Dec. 115; six days, 20 Johns. 502 s. c. 11 Am. Dec. 307; five days, 10 Gratt. 548; four days, 21 Pa. St. 296; one day, 6 Watts & Serg. 184; 2 Stew. 364; 33 Md. 569; one hour before death, 10 Pa. St. 254. Cases where such will was held not invalid because testator may have had time, opportunity and capacity to reduce it to writing, 82 Ill. 50 s. c. 25 Am. Rep. 290; 2 Ala. (N. S.) 242; 7 Heisk. 215; 22 Ga. 293. Testamentary intention necessary, 57 Mass. 115; 15 Phila. 651; 3 Leigh 140; 2 Stew. 364; 27 IH. 247; 26 N. H. 372; 36 Md. 630; 33 Miss. 629; 9 B. Mon. 553; 14 La. Ann. 729.

§ 5992. **Must be admitted to probate within six months.** No nuncupative will shall be admitted to record, unless the same shall be offered for probate within six months after the death of the testator. [50 v. 297, § 75.]

§ 5993. **Expenses and fees.** The expense of proving and recording wills, shall be paid by the party at whose instance the same is done; and the witnesses and officers shall have the like fees for attendance and services as in other cases; and upon the executor or administrator being appointed the expense shall be re-imbursed out of the estate. [50 v. 297, § 76.]

CHAPTER II.

EXECUTORS AND ADMINISTRATORS.

§ 5994. **What court shall grant administration.** Upon the decease of any inhabitant of this state, letters testamentary or letters of administration on his estate, shall be granted by the probate court of the county in which the deceased was an inhabitant or resident at the time of his death; and when any person shall die intestate in any other state or country, leaving any estate to be administered within this state, administration thereof shall be granted by the probate court of any county in which there is any estate to be administered; and the administration which shall be first lawfully granted, in the last mentioned case,

shall extend to all the estate of the deceased, within the state; and shall exclude the jurisdiction of the probate court in every other county. [38 v. 146, § 1.]

Form of application for appointment as executor or administrator.—To the Honorable, the Judge of the Probate court of _____ county, Ohio:

Your petitioner represents that A. B., late of said county, died _____ testate on or about the _____ day of _____ 18____, leaving an estate to be administered, worth about \$ _____ consisting of Personalty estimated at _____ \$ _____ and Realty estimated at _____ \$ _____

The following named persons are the next of kin of said decedent:

NAME.	RELATIONSHIP.	RESIDENCE.
_____	_____	_____
_____	_____	_____

Your petitioner asks to be appointed _____ of said estate, and offers as sureties _____ Residence _____ Residence _____ Residence.

Resident freeholders of said county, and suggests that the court appoint _____ appraisers.

(sign full name) _____
 Petitioners residence _____
 Place of business _____

_____ Attorneys.
 State of Ohio, _____ county, ss. Personally appeared before me, the undersigned, Judge of the Probate court in and for said county _____ who upon oath deposeth and saith that the foregoing statement of the real and personal property of the said A. B. deceased, is in all respects just and true, according to the best of _____ knowledge; and [in case of intestacy] that there is not to _____ knowlege any last will and testament of said decedent.

Sworn and subscribed to before me this _____ day of _____ 188-

_____ Probate judge.

By _____ Deputy clerk.

Relinquishment of right.—The undersigned hereby relinquishes _____ right to administer the estate of A. B. deceased, and asks the court to appoint _____

§ 5995. When letters testamentary to issue. When any will shall be duly proved and allowed, the probate court shall issue letters testamentary thereon, to the executor, if any be named therein, if he is legally competent, and if he shall accept the trust, and shall give bond, if bond required to discharge the same;

otherwise, the court shall grant letters of administration on the estate, as hereinafter provided. [38 v. 146, § 2.]

§ 5996. Bond of executor and its condition; when bond not required. Every executor, before entering upon the execution of his trust, shall give bond, with two or more sufficient sureties, in such sum as the court shall order, payable to the state, with condition, as follows:

First—To make and return to the court, on oath, within three months, a true inventory of all the moneys, goods, chattels, rights and credits of the testator which are by law to be administered, and which shall have come to his possession or knowledge; and, also, if required by the court, an inventory of the real estate of the deceased.

Second—To administer according to law, and to the will of the testator, all his goods, chattels, rights and credits, and the proceeds of all his real estate, that may be sold for the payment of his debts or legacies, which shall at any time come to the possession of the executor, or to the possession of any other person for him; and,

Third—To render, upon oath, a just and true account of his administration, within eighteen months, and at any other times when required by the court or the law; and failing so to do for thirty days after he shall have been notified of the expiration of the time by the probate judge, he shall receive no allowance for services, unless the court shall enter upon its journal that such delay was necessary and reasonable.

And when there are two or more persons appointed executors, none shall intermeddle or act as such but those who actually give bond as before prescribed: provided, however, that when, by the terms of any last will, the testator shall express a wish that his executor may execute the same without giving bond, the court admitting the will to probate, may at its discretion, grant letters testamentary, with or without bond, as may seem expedient; and, when granted without bond, may, at any subsequent period, upon the application of any party interested, require bond

to be given, and in default of his giving the same, he may be removed. . [59 v. 98, § 3; 45 v. 25, § 2.]

Form of bond.—Know all men by these presents, that we, A. B., C. D. and E. F. are held and firmly bound unto the State of Ohio in the sum of——dollars, to the payment of which we do hereby jointly and severally bind ourselves, our heirs, executors and administrators.

The condition of the above obligation is such, that * whereas, letters testamentary upon the estate of G. H., deceased, were granted to the said A. B., by the probate court of —— county, in the State of Ohio on the——day of ——A. D. 188-; now if the said A. B. as executor of the last will and testament of the said G. H., deceased, shall:

First.—Make and return to the court, on oath, within three months, a true inventory of all the moneys, goods, chattels, rights, and credits of the testator which are by law to be administered, and which shall have come to his possession or knowledge; and also, if required by the court, an inventory of the real estate of the deceased.

Second.—Shall administer according to law, and to the will of the testator, all his goods, chattels, rights, and credits, and the proceeds of all his real estate, that may be sold for the payment of his debts, or legacies, which shall at any time come to the possession of the executor, or to the possession of any other person for him; and

Third.—Shall render, upon oath, a just and true account of his administration, within eighteen months, and at any other times when required by the court or the law; and failing so to do for thirty days after he shall have been notified of the expiration of the time by the probate judge, he shall receive no allowance for services, unless the court shall enter upon its journal that such delay was necessary and reasonable; then this obligation to be void; otherwise to remain in full force.

Signed by us this——day of——A. D. 188-.

Executed in presence of——

Affidavit of bondsmen.—State of Ohio,——county, ss. Personally appeared before me, the undersigned, Judge of the Probate court in and for the county of——C. D. and E. F. who upon oath depose and say that they are residents of said county, and that they own real estate, situate in the county of ——State of Ohio, worth the sum of [*By order of the Probate court of Hamilton county "on all bonds taken in this court there shall not be less than two sureties, who must be residents of this county, and such sureties on each bond must in the aggregate own real estate in this county worth double the amount of the bond beyond their debts, and have real estate in this county liable to execution, equal to the amount stated in the bond"*]——dollars beyond their debts, and that they have real property liable to execution in this county, worth——dollars.

(Signed)

Sworn to and subscribed before me this——day of——18—

——Probate judge.
By——Deputy clerk.

Entry approving bond.—[Title.] A. B. having filed his bond as executor herein in the sum of——dollars, with C. D. and E. F. as sureties, and the court having examined said sureties concerning their qualifications and having also examined said bond, it is hereby approved and on the recommendation of said A. B., the court hereby appoints I. J., K. L. and M. N., three suitable disinterested persons, appraisers of the property of said deceased.

Letters Testamentary.—State of Ohio, — County, ss: Whereas, G. H., late of the county of —, and State of Ohio, died, leaving a last will and testament (a copy whereof is hereto attached), which said will and testament has been duly proven and admitted to probate and record by our Probate Court within and for the county aforesaid, on the — day of —, A. D. 188—. Know ye, therefore, that the Probate Court of said county doth hereby grant unto A. B., the executor in said will and testament named letters testamentary thereon,† hereby granting to said executor all and singular the powers necessary and by law required, to enable him to take an inventory of, collect, sue for, and recover, all and singular, the goods, chattels and credits of the said deceased, and out of the same, or such part thereof as shall come to his hands, the debts of the said deceased [and the legacies in said will named] to pay and discharge according to law, and to the will of said testator, and the same fully to administer in all things as required by law.* And the Court has appointed I. J., K. L. and M. N. to appraise on oath or affirmation, all and singular, the goods, chattels and credits of the said deceased.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said Probate Court at —, this — day of —, in the year of our Lord one thousand eight hundred and eighty-eight.

— —, Probate Judge.

Notes.—Letters can not be granted on the estate of a life convict, 17 O. 260; or of any living person, 62 Cal. 60. A bond given by an executor or administrator is governed by the laws in force at the time it was given, 20 O. 93.

§ 5997. **Bond when executor is residuary legatee.** If the executor is residuary legatee, he may, instead of the bond prescribed in the preceding section, give bond in a sum, and with two or more sureties, to the satisfaction of the court, with condition to pay all the debts and legacies of the testator; in which case he shall not be required to return an inventory. [38 v. 146, § 4.]

Form of Bond.—[Follow the form under the preceding section down to *, and continue as follows]: Whereas, by the last will and testament of G. H., deceased, duly admitted to probate by the Probate Court of — County, Ohio, the said A. B. is made residuary legatee of all the estate, both real and personal, [or, of the personal estate] of said G. H., deceased,

Now, if the said A. B. shall pay all the debts and legacies of the said decedent, together with all the charges of administration, and all other legal claims against said estate, then this obligation to be void; otherwise to remain in full force.

Signed, etc., [*as in form under preceding section.*]

In an action against an executor upon his bond as residuary legatee, it is not necessary that the petition allege the presentment of the claim for allowance, or other matters specified in § 6108, 13 O. S. 525.

§ 5998. Such bond not to discharge lien on real estate except, etc. The giving of such bond as is prescribed in the preceding section, shall not discharge the lien on the real estate of the testator, for the payment of his debts, except only on such part thereof as shall have been lawfully sold by the executor, to one who purchased in good faith and for a valuable consideration. [38 v. 146, § 5.]

§ 5999. Separate or joint bond may be taken.—Sureties to be inhabitants of state. When two or more persons are appointed executors, administrators or testamentary trustees, the court may take a separate bond, with sureties, from each of them, or a joint bond, with sureties, from all of them together; and in all bonds with sureties, given by executors, administrators or trustees, all the sureties shall be inhabitants of this state, and such as the court shall approve; and the bonds shall be filed in the court taking the same. [38 v. 146, § 6.]

When two administrators give a joint bond, with surety for the faithful administration of the estate that may come to their possession and thereafter all the property of the deceased comes into their joint possession, if waste is committed by one of the administrators, after the death of the other, it will be the right of the surety, that the estates of both the administrators shall be exhausted before the surety shall be subjected for the surviving administrator's default, 45 O. S. —; 19 Bull 825. Such administrators, as between themselves and the surety, are principals, and the surviving administrator and the representatives of the deceased administrator will be jointly liable to indemnify the surety, if he has been subjected for the waste, committed by one of the principals after the death of his associate, *Id.*

§ 6000. If executor renounces, etc., administration to be granted. If any person, who is named as executor in the will of a decedent, shall refuse to accept

the trust, or if, after being duly cited for that purpose, shall neglect to appear and accept, or if he shall neglect, for twenty days after probate of the will, to give bond, as before prescribed, the court shall grant letters testamentary to the other executor, if there be any capable and willing to accept the trust; and if there is no such other executor named in the will, the court shall commit administration of the estate, with the will annexed, to such person as would be entitled thereto, if the deceased had died intestate. [82 v. 223, 38 v. 146, § 7.]

Letters of administration with the will annexed.—State of Ohio—county, ss. Whereas G. H., late of the county of— and State of Ohio, died, leaving a last will and testament (a true copy whereof is hereto attached) which said will has been duly proven and admitted to record by our probate court within and for the county aforesaid, on the—day of— A. D. 18—.

And whereas the executor in said will named has refused to accept the trust [*follow the statute above according to the nature of the case.*]

Know ye, therefore, that the said probate court has granted unto X. Y. letters of administration with the said will thereto annexed. [*Follow form under § 5993 from † on to the end.*]

§ 6001. Administration during the minority of an executor. When a person appointed executor is under the age of twenty-one years, at the time of proving the will, administration may be granted with the will annexed, during his minority, unless there be another executor who will accept the trust, in which case the estate shall be administered by such other executor, until the minor shall arrive at full age, when he may be admitted as executor with the former, upon giving bond as before provided. [38 v. 146, § 8.]

§ 6002. Bond of administrator with the will annexed. Every person who is appointed administrator with the will annexed, shall, before entering on the execution of his trust, give bond in like manner, and with like condition as is required of an executor. [38 v. 146, § 9.]

The form is the same as that under § 5993, the words "letters of administration with the will annexed" being substituted for "letters testamentary" in the second paragraph and "administrator with the will annexed of the estate," etc. for "executor."

§ 6003. Executor of an executor not to administer the estate of the first testator. The executor of an executor shall have no authority, as such, to administer the estate of the first testator; but on the death of the sole or surviving executor of any last will, administration of the estate of the first testator, not already administered, may be granted, with the will annexed, to such person as the court shall think fit to appoint. [38 v. 146, § 10.]

§ 6004. Powers of an executor before letters testamentary are granted. No executor named in a will, shall, before letters testamentary are granted, have any power to dispose of any part of the estate of the testator, except to pay funeral charges, nor to interfere, in any manner, with such estate, further than is necessary for its preservation. [38 v. 146, § 11]

§ 6005. To whom letters of administration shall be granted. Administration of the estate of an intestate shall be granted to some one or more of the persons hereinafter mentioned; and they shall be, respectively, entitled thereto in the following order, to wit:

First—The husband or widow of the deceased, or next of kin, or both, as the court may think fit; and if they do not voluntarily either take or renounce the administration, they shall, if resident within the county, be cited by the court, or notified by a party in interest, for that purpose.

Second—If the persons, so entitled to administration are incompetent, or evidently unsuitable for the discharge of the trust, or if they neglect, without any sufficient cause, to take administration of the estate, the court shall commit it to one or more of the principal creditors, if there be any competent and willing to undertake the trust.

Third—If there be no such creditor, and the court is satisfied that the estate exceeds the value of one hundred dollars, the court shall commit administration to such other person as it shall think fit: provided, however, that letters of administration shall not be issued upon the estate of an intestate until the person to be appointed has made and filed an affidavit that there is not, to his knowledge, any last

will and testament of the alleged intestate: provided, further, that every person, before being appointed executor or administrator, shall make and file an application under oath, which shall contain the names of the husband or widow and all the next of kin of the deceased, to such person known, their post office address, if known, and also a statement in general terms as to what the estate consists of, and the probable value thereof. [82 v. 223]

See § 6013 as to administration in case of non-resident in business in Ohio. The next of kin are entitled to a reasonable time to apply for letters. Eighteen days reasonable, 39 O. S. 181. A domestic creditor is entitled to be appointed administrator of a foreigner owning lands here, 4 O. 68. The laws of this State do not recognize an administrator *de son tort*, 15 O. 517. Agreement to secure appointment as administrator of one not entitled thereto by relationship and furnish him with bond, void, 15 Bull 386. See *form* § 5994 *n*.

§ 6006. Bond of administrator and its condition. Every administrator shall, before entering on the execution of his trust, give bond with two or more sufficient sureties, in such sum as the court shall order, payable to the state, with condition, as follows:

*First—To make and return into court, on oath, within three months, a true inventory of all moneys, goods, chattels, rights and credits of the deceased, which have or shall come to his possession or knowledge; and, also, if required by the court, an inventory of the real estate of the deceased.

Second—To administer according to law, all the moneys, goods, chattels, rights and credits of the deceased, and the proceeds of all his real estate that may be sold for the payment of his debts, which shall at any time come to the possession of the administrator or to the possession of any other person for him.

Third—To render, upon oath, a true account of his administration, within eighteen months, and at any other times when required by the court or the law, and failing so to do for thirty days after he shall have been notified of the expiration of the time by the probate judge, he shall receive no allowance for services, unless the court shall enter upon its journal that such delay was necessary and reasonable.

Fourth—To pay any balance remaining in his hands upon the settlement of his accounts, to such persons as the court or the law shall direct; and,

Fifth—To deliver the letters of administration into court, in case any will of the deceased shall be thereafter duly proved and allowed. [59 v. 98, § 13.]

Form of administration bond. [Follow the form under § 5998 to * and continue.] Whereas, letters of administration upon the estate of G. H. deceased were granted to the said A. B. by the probate court of——county, in the State of Ohio, on the——day of——18——; now if the said A. B. as administrator of the estate of said deceased shall first, [Follow the words of the above § 6006 from * to the end.] then this obligation to be void, otherwise to remain in full force. (Signed, etc.)

Letters of Administration.—State of Ohio, — County, ss: To all who shall see these presents, greeting: Whereas, G. H., late of the county of —, and State of Ohio, died intestate; whereby it becomes expedient that the Probate Court within and for the county aforesaid, should appoint some suitable and trusty person or persons to collect and administer, all and singular, the goods, chattels and credits of the said A. B., deceased, whereof he died possessed. Know ye, therefore, that the said Probate Court has nominated and appointed, and by these presents does nominate and appoint A. B. administrator of all and singular, the goods, chattels and credits of the deceased; hereby granting to said administrator, all and singular, the power necessary, and by law required, to enable him to take an inventory of, collect, sue for and recover, all and singular, the goods, chattels and credits of the said deceased; and out of the same, or such part thereof as shall come to his hands, the debts of the said deceased to pay and discharge according to law, and of the rest and residue of said goods, chattels and credits, to make a just and lawful distribution, and the same fully to administer in all things by law required. [Follow form under § 5996 from *.]

Notes.—The sureties upon an executor's or administrator's bond are liable on the same for the proceeds of lands sold under an order of court for the payment of debts, 4 O. 127; and when the obligor on such bond becomes administrator of an obligee, the bond is suspended, and the debt due becomes assets in the hands of the debtor's administrator, 16 O. S. 273. The omission of an administrator to give a bond with the requisite number of sureties upon it will not affect his right to recover in an action where letters have been issued by the Probate Court upon the bond as given, and remain unrevoked, 44 O. S. 637.

§ 6007. Special administrator, when appointed. When by reason of a suit concerning the proof of a will, or from any other cause, there shall be a delay in granting letters testamentary, or of administration, the

court may, in its discretion, appoint a special administrator to collect and preserve the effects of the deceased. [38 v. 146, § 14.]

§ 6008. Bond of special administrator. Every such special administrator, before entering upon the duties of his trust, shall give bond, with two or more sufficient sureties, in such sum as the court shall order, payable to the state of Ohio, with condition that he will make and return into court, within three months, a true inventory of all the moneys, goods, chattels, rights, and credits of the deceased which have or shall come to his possession or knowledge, and that he will truly account, on oath, for all the moneys, goods, chattels, debts, and effects of the deceased, that shall be received by him as such special administrator, whenever required by the court, and will deliver the same to the person who shall be appointed executor or administrator of the deceased, or to such other person as shall be lawfully authorized to receive the same. [38 v. 146, § 15.]

Form of Bond.—[Follow form under § 5996 down to *, and continue as follows]: Whereas, the Probate Court of — county, in the State of Ohio, on the — day of —, A. D., 188—, appointed the said A. B. special administrator to collect and preserve the effects of G. H., deceased. Now, if the said A. B., as special administrator, as aforesaid, shall make and return into said court within three months, etc., [Follow the words of the statute above to the end] then this obligation to be void; otherwise to remain in full force. Signed, etc.

§ 6009. Powers, duties and compensation of special administrator. Such special administrator shall collect all the goods, chattels, and debts of the deceased, and preserve the same for the executor or administrator who may thereafter be appointed; and for that purpose, may commence and maintain suits as an administrator, and may also sell such perishable and other goods as the court may order to be sold; and he shall be allowed such compensation for his services as the court shall think reasonable, if he delivers over forthwith to the executor or administrator who may supersede him, the property and effects of the estate, as hereinafter provided. [38 v. 146, § 16.]

§ 6010. Powers of special administrator to cease on appointment of administrator, etc. Upon the granting

of letters testamentary or of administration, the power of the special administrator shall cease, and he shall forthwith deliver to the executor or administrator all the goods, chattels, moneys, and effects of the deceased in his hands; and the executor or administrator may be admitted to prosecute any suit commenced by the special administrator, in like manner as an administrator *de bonis non* is authorized to prosecute a suit commenced by a former executor or administrator. [38 v. 146, § 17.]

§ 6011. How special administrator may be proceeded against by the executor, etc. If such special administrator shall neglect or refuse to deliver over the property and estate to the executor or administrator, as provided in the preceding section, the court may, by citation and attachment, compel him to do so; and the executor or administrator may also proceed, by civil action, to recover the value of the assets from him and his sureties. [38 v. 146. § 18.]

Form of Citation.—State of Ohio, — county, ss.

To A. B., special administrator of the estate of [or executor of the last will and testament] of C. D. deceased:

You are hereby required, on or before the — day of — A. D. 188- to deliver to E. F., executor of the last will and testament [or administrator of the estate] of C. D. deceased, all the goods, chattels, moneys and effects of said decedent in your hands according to law, or to appear in this court on — day of — 188-, and show cause why an attachment should not issue against you for your default.

Witness my signature and the seal of said probate court, at — this — day of — A. D. 188-.

[seal]

—— Probate judge.

Journal entry.—State of Ohio, on application of E. F. executor, etc. v. A. B. special administrator, etc. The writ of citation having been returned served, upon said A. B., defendant, requiring him on or before the — day of — A. D. 188- to deliver to said E. F. executor, etc., all the goods, chattels, moneys and effects of said decedent in his hands; and said A. B. having failed to comply with the order aforesaid, or to show cause why an attachment should not issue against him for his default, it is ordered that a writ of attachment issue to the sheriff of — county, to bring the body of said A. B. into this court forthwith, to abide such order as the court may make concerning him in this behalf.

Writ of attachment.—State of Ohio, — county, ss.

To the sheriff of said county, greeting:

Whereas, A. B., special administrator of the estate of C. D.,

deceased, was by the order of the probate court of said county required to deliver to E. F., the duly appointed executor [or administrator of the estate] of the last will and testament of said decedent, all the goods, chattels, moneys and effects of said decedent in his hands, on or before the—day of —188—, or to show cause why an attachment should not issue against him for his default, and the said A. B. having failed to comply with the order aforesaid, you are therefore commanded to take the said A. B. and have his body forthwith before said court, to abide such order as may be made concerning him in this behalf. Hereof fail not and bring this writ with you.

Witness my signature and the seal of said probate court, etc.

§ 6012. Special administrator not liable to creditors—limitation of action against executor, etc. Such special administrator shall not be liable to an action by any creditor of the deceased; and the time of limitation for all suits against the estate shall begin to run from the time of granting letters testamentary or of administration in the usual form, in like manner as if such special administration had not been granted. [38 v. 146, § 19.]

§ 6013. Administration and proceeding when decedent was not a resident of the state but engaged in business therein, etc. In all cases where any person has heretofore died or shall hereafter die, whether testate or intestate, such person not being at the time of his decease a resident of this state, but having been engaged in the prosecution of business therein, as a partner or otherwise, and leaving in this state any property belonging in whole or in part to his estate, the probate court of the county in which such business may have been prosecuted as aforesaid, or of any county in which such property may be situated, or where any debtor of such decedent may reside, shall, upon the application of any creditor of such decedent, whose claim is founded on a contract made or a right of action which accrued within this state, grant to such creditor or to some other person, administration of all and singular the assets of such decedent situate within this state; and the proceeds of such assets shall be applied to the payment of the debts which shall be proved against such estate before such administrator; and the surplus, if any, shall be paid into the court granting such administration for the benefit of the estate of such decedent, in the

state where the decedent resided at the time of his death. [49 v. 106, § 1, 2.]

§ 6014. **Limitation for granting original administration—exception.** Administration shall not be originally granted as of right, after the expiration of twenty years from the death of the testator or intestate; provided, nevertheless, that each probate judge shall have power, within his county, to grant letters of original administration upon the estate of any person heretofore deceased, or who may hereafter die, as well after as before the expiration of the said period of twenty years, upon petition of the next of kin or other person or persons interested, or their agent, and on good cause shown for granting such letters as aforesaid; and the said judge may, before allowing the prayer of any such petition, direct notice thereof to be given, by publication for a period not exceeding thirty days, in one or more of the newspapers printed in the county where such petition is filed. [50 v. 127, § 1.]

§ 6015. **Resignation of executor or administrator.** The court issuing letters testamentary or appointing an administrator, may, if it thinks fit, and upon good cause shown, receive the resignation of such executor or administrator, and appoint an administrator in his place. [38 v. 146, § 21.]

Under foreign will see 40 O. S. 365. Purchase of stock belonging to estate after, 11 Bull 67.

§ 6016. **Effect of such resignation.** The acceptance of such resignation, and the appointment of another administrator, shall not affect the liability of such former executor or administrator, or his sureties, previously incurred. [38 v. 146, § 22.]

By accepting the resignation of an administrator pending the settlement of his accounts, the probate court does not thereby lose its jurisdiction over his person, or the settlement of accounts and may proceed to hear and determine exceptions thereto and ascertain the amount due from him to the estate, in like manner as if he had continued in the execution of his trust; and the amount so found due will in the absence of fraud and collusion be conclusive not only upon him but upon his sureties, in an action upon the administration bond, unless an appeal has been taken, or the judgment has been reversed upon a proceeding in error, 44 O. S. 637.

§ 6017. **Removal of executor or administrator and cause therefor.** The probate court may at any time remove any executor or administrator, he having twenty days' notice thereof, for habitual drunkenness, gross neglect of duty, incompetency, fraudulent conduct, removal from the State, or that there are unsettled claims or demands existing between him and the estate, which in the opinion of the court may be the subject of controversy or litigation between him and the estate, or persons interested therein, or any other cause which in the opinion of such court renders it for the interest of the estate that such executor or administrator be removed, and the other executor or administrator, if any there be may proceed in discharging the trust as if the executor or administrator so removed were dead, and if there be no other executor or administrator to discharge the trust, the court may commit the administration of the estate not already administered to some other person or persons, in like manner as if the executor or administrator so removed were dead. [81 v. 137.]

Error and not appeal lies from order of removal, 15 O. S. 484. Removal terminates authority over assets received or unreceived, 6 O. 418. All parties interested are bound to take notice, 5 O. 200. Acts prior to removal are valid, 4 O. 138, 148. When a removed executor or administrator has settled with the court and the balance in his hands is ascertained, suit may be sustained against his sureties without first obtaining a personal and separate judgment against him; and in such suit it is not necessary to aver that the removed administrator has had notice of his successor's appointment, 5 O. 200.

Conviction of larceny in another state held not to incapacitate, 12 Bull 245. Insanity, see 15 Bull 239. Where testator's widow was given a life estate with remainder to her children, and the executors turned over the entire estate to her without exacting any security, held that such conduct justified their dismissal, 15 Bull 190.

§ 6018. **Administration de bonis non when to be granted.** When any sole executor or administrator shall die without having fully administered the estate, the court shall grant letters of administration, with the will annexed, or otherwise, as the case may require, to some suitable person, to administer the goods and estate of the deceased, not already administered; provided, there be personal estate of the de-

ceased not administered, to the amount of twenty dollars, or debts to a like amount remaining due from the estate. [18 v. 146, § 24.]

Form of bond same as under § 6006. "administrator *de bonis non*" being substituted for "administrator," and "letters of administration *de bonis non*" for "letters of administration."

§ 6019. Will proved after administration granted—effect. If, after granting letters of administration, as of an intestate estate, a will of the person deceased shall be duly proved and allowed, the first administration shall be revoked by the court, unless a petition contesting the probate of such will shall, before such revocation, be filed in the court of common pleas, in which case, in the discretion of the probate court, the administration may be continued in the hands of the original administrator, until the final determination of such proceedings to contest, when, if the will is sustained, the first administration shall be revoked; and in either case, upon the revocation of the first administration and the appointment of an executor or administrator with the will annexed, the executor or administrator with the will annexed shall be admitted to prosecute or defend any suit, proceeding, or matter commenced by or against the original administrator, in like manner as an administrator *de bonis non* is authorized to prosecute or defend a suit commenced by a former executor or administrator. [73 v. 109, § 25.]

4 O. 138; 18 O. 268.

§ 6019 a. Powers of executors and administrators, etc., during contest of will. Whenever a will is contested, the executor or the administrator, or administratrix *de bonis non*, with the will annexed, or the testamentary trustee shall have power, during the contest of said will, to control all the real estate not specifically devised, included in said will, and all the personal estate of said testator, not before said contest duly administered, to collect the debts, and convert all assets into money, except such as may be specifically bequeathed, pay all taxes on said real and personal property, and all debts according to law, and whenever necessary to preserve said real property from waste, to repair buildings and other improve-

ments, and insure the same, upon an order therefor first obtained from the probate court having jurisdiction of such executor or administrator or testamentary trustee and for such repairs, taxes and insurance, to advance or borrow money on the credit of such estate, which shall be a charge thereon: and shall also have power to receive and receipt for any distributive share of any estate or trust to which such testator would have been entitled, if living. The probate court may require such additional bonds as from time to time may be proper. [85 v. 252, 84 v. 174.]

§ 6020. Proceedings by administrator or executor against former administrator or executor. An administrator or executor appointed in the place of an executor or administrator who has resigned, been removed, or whose letters have been revoked, or authority extinguished, shall be entitled to the possession of all the personal effects and assets of the estate unadministered, and may maintain a suit against the former executor or administrator and his sureties on administration bond, for the same and for all damages arising from maladministration or omissions of the former executor or administrator. [38 v. 146, § 26.]

Liability of sureties on bond of removed executor for conversion of assets in action by successor, 19 Bull 317; § 6204 n. The cause of action survives against personal representatives of deceased executor or administrator, 2 O. S. 431. This section does not authorize an administrator *de bonis non* upon the death *in office* of the first administrator to bring suit against his representatives, or the sureties on his official bond, 20 O. 479. Judgment against such former administrator is evidence against him and his sureties in an action on his administration bond, and can only be impeached by proving fraud or mistake, 18 O. 225. An order of the probate court duly entered of record, on exceptions filed to an executor's or administrator's account, is not a bar to an action by an administrator *de bonis non* against such executor for matters found by the probate court against the widow and heirs on such exceptions, 2 O. S. 431. "Personal effects and assets of the estate unadministered" include the indebtedness of an administrator resigned, to the estate on account of assets received and converted to his own use, as well as such effects and "assets" as remain in specie, and may be recovered by his successor in an action upon the administration bond, 44 O. S. 637. Where upon the settlement of the account of an administrator who has resigned or been removed, the amount due from him to the estate has been ascertained and determined by the probate court it is not error, to

order its payment to his successor, *Id.* The averment of a failure of an administrator or executor who has resigned to pay to his successor the amount found due from him on the settlement of his accounts, is a sufficient assignment of a breach of the condition of his bond "to administer according to law" the assets of the estate, *Id.* The omission of an administrator to give bond with the requisite number of sureties upon it, will not affect his right to recover in an action where letters have been issued by the probate court upon the bond as given and remain unrevoked, *Id.* A settlement of the account of an executor who has been removed does not bar a subsequent suit by him against his successor upon a demand existing in the life time of his testator, 2 C. C. R. 7.

§ 6021. **Sales, etc., of former executor or administrator valid.** Where any letters of administration shall be revoked, or when any executor or administrator, or administrator with the will annexed, shall be removed or resign, or the authority as such, of a woman extinguished, or a will shall be declared invalid for any cause, all previous sales, whether of real or personal property, made lawfully and in good faith by the executor or administrator, or administrator with the will annexed, and with good faith on the part of the purchasers, and all lawful acts done in the settlement of the estate or execution of the will, shall be valid as to such executor or administrator, or administrator of the will annexed, but the sums paid out or distributed to legatees or other distributees may, when necessary for the proper execution of a will or administration of an estate, be recovered from the persons receiving the same. [78 v. 9; 38 v. 146, § 27.]

Should a will be discovered after the estate of a decedent has been fully settled and all moneys and assets which have come into his hands have been paid over by the administrator in pursuance of an order of court, and the will be then duly proved, the executor appointed in such will can not compel the former administrator to account for the money and other property received and so paid over, 12 O. 268, see 4 O. 128.

§ 6022. **Marriage of executrix or administratrix extinguishes her authority.** When an unmarried woman, who is executrix or administratrix, either alone or jointly with another person, shall marry, her husband shall not be executor or administrator in her right, but the marriage shall operate as an extinguishment of her authority as executrix or administratrix; and the other executor or administrator, if there is any, may proceed in discharging the trust, as if she were

dead; and if there is no other executor or administrator, administration may be granted of the estate not already administered; and such administrator may proceed to discharge the trust, in like manner as if the executrix or administratrix were dead. [38 v. 146, § 28]

An order of sale once begun, is not abated by the subsequent marriage of an administratrix, 16 O. 563. Marriage of executrix extinguishes her power and it does not revive on the death of her husband, 19 Bull 149 cf. 1 D. 585.

THE INVENTORY: THE ALLOWANCE TO THE WIDOW AND CHILDREN: AND THE DEBTS DUE TO THE ESTATE.

§ 6023. **Inventory to be returned within three months except, etc** Every executor or administrator shall, within three months after his appointment, make and return upon oath, into court, a true inventory of all the goods, chattels, moneys, rights, and credits of the deceased, which are by law to be administered, and which shall have come to his possession or knowledge; except only that an executor who is a residuary legatee, may give bond to pay all the debts and legacies of the deceased, as hereinbefore provided; and he shall, thereupon, be excused from returning such inventory, provided, that an administrator *de bonis non* shall not be required to return and file an inventory, where the assets of the estate have been converted into money, unless in the opinion of the probate court, the same is necessary. [82 v. 130; 38 v. 146, § 29.]

§ 6024. **Exceptions to inventory and proceedings thereon. Appeal to common pleas.** At any time within one year after the return of an inventory, any person interested in the estate may file exceptions to the inventory; and, thereupon, the court shall set a day for the hearing thereof, and cause written notice of such filing and of the time so fixed for the hearing, to be given to the executor or administrator, not less than five days before the time so fixed for the hearing; and for good cause the hearing may be continued for such time as the court shall deem reasonable; and at the hearing the executor or administrator and any

witness subpoenaed by either party may be examined under oath; and the court shall enter its finding on the journal and tax the costs as may be equitable; and an appeal may be taken to the court of common pleas by either party, from any finding, order, judgment or decision of the probate court on the hearing of said exceptions to the inventory, as in other cases. [80 v. 67; 72 v. 174, § 1, 2, 56.]

§ 6025. When real estate to be included in the inventory. If the court, at the time of granting letters testamentary or letters of administration, shall think fit, it may order the executor or administrator to also include in the inventory an appraisement of all the real estate of the deceased. [38 v. 146, § 30.]

§ 6026. When emblements shall be assets. The emblements or annual crops raised by labor, and whether severed or not from the land of the deceased, at the time of his death, shall be assets in the hands of the executor or administrator, and shall be included in the inventory. [38 v. 146, § 31.]

In March a tenant for life rented to "H." for \$300, a farm upon which to raise a crop of corn and died in July. In November, when the crop was gathered, the cropper paid the rent to the executor of the life tenant. The tenant in reversion brought suit to recover a proportionate share of the rent as so much money paid for his use to the executor; held that he was not entitled to recover any portion of it, 8 C. C. R. 64.

§ 6027. Power to cultivate and gather crops. The executor or administrator, or the person to whom he may sell such emblements may, at all reasonable times, enter upon the lands to cultivate, sever and gather the same. [38 v. 146, § 32.]

§ 6028. Appraisers, how appointed. The estate and effects comprised in the inventory shall, unless an appraisement thereof has been dispensed with by an order of court, be appraised by three suitable disinterested persons, who shall be appointed by the court, and sworn to a faithful discharge of their trust; and if any part of such estate or effects be in any other county, any disinterested justice of such county may appoint the appraisers of the estate and effects therein. [38 v. 146, § 33.]

Justice of Peace entitled to fee of forty cents for issuing order to appraisers, § 621.

§ 6029. If appraisers fail to act, justice may appoint others. If by neglect, sickness, or other cause, any of the appraisers shall fail to attend to the performance of their duty, any justice of the peace in the county in which the property to be appraised is situate, may appoint others to supply the place of such delinquent appraisers. [38 v. 146, § 34.]

§ 6030. Form of appointment of appraisers by justice. When a justice appoints appraisers he shall make a certificate of the appointment which shall be returned by the executor or administrator with the inventory, and which shall be in substance as follows:

To _____, of _____ county:

You are hereby appointed to appraise, on oath, the estate and effects of _____, late of _____ county, deceased. Given under my hand this _____ day of _____,

Justice of the Peace.

[38 v. 146, § 35.]

§ 6031. Inventory to be made and by whom. After giving the notice in the next section required, the executor or administrator shall, with the aid of the appraisers, if an appraisement is made, make the inventory herein directed. [38 v. 146, § 36.]

§ 6032. How and when notice to be given. A notice of the time and place of making such inventory and appraisement shall be served by the executor or administrator not less than five days previous thereto, on the widow, legatees, and next of kin, residing in the county, where such property shall be, and it shall also be posted in two of the most public places in the township in which the deceased last dwelt; and in every such notice the time and place at which such appraisement will be made shall be specified. [38 v. 146. § 37.]

§ 6033. Appraisers' oath; by whom administered. Before proceeding to the execution of their duty, the appraisers shall take and subscribe an oath, to be inserted in

or annexed to the inventory, before an officer authorized to administer oaths, that they will truly, honestly, and impartially appraise the estate and property which shall be exhibited to them, and perform the other duties required by law in the premises, according to the best of their knowledge and ability. [38 v. 146, § 38.]

Form under § 6046.

§ 6034. In whose presence and in what manner the articles shall be appraised. The appraisers shall, in the presence of such of the next of kin, legatees or creditors of the testator or intestate, as shall attend, and the widow, if there be one, proceed to estimate and appraise the property and estate; and each article or item shall be set down separately, with the value thereof, in dollars and cents, distinctly in figures, opposite to the articles or items, respectively. [38 v. 146, § 39.]

§ 6035. How bonds and other securities to be inventoried and appraised. The inventory shall contain a particular statement of all bonds, mortgages, notes and all other securities for the payment of money, belonging to the deceased, which are known to such executor or administrator, specifying the name of the debtor in each security, the date, the sum originally payable, the indorsements thereon, if any, with their dates, and the sum which, in the judgment of the appraisers, can be collected on each claim. [38 v. 146, § 40.]

Form under § 6046.

§ 6036 How other debts shall be inventoried and appraised. The inventory shall also contain a statement of all other debts and accounts belonging to the deceased, which are known to such executor or administrator, specifying the name of the debtor, the date, the balance or thing due, and the value or sum which can be collected thereon, in the judgment of the appraisers. [38 v. 146, § 41.]

Notes delivered to an executor to indemnify the estate against the liability of the testator as surety are not assets of the estate, nor is money collected on them, 15 O. 432.

§ 6037. How inventory of money and bank bills to be stated. The inventory shall also contain an account of all moneys, whether in specie or bank bills, or other circulating medium, belonging to the deceased, which shall have come to the hands of the executor or administrator; and if none shall have come to his hands, the fact shall be so stated in said inventory. [38 v. 146, § 42.]

§ 6038. What property shall not be deemed assets to be administered on in certain cases. When any person shall die, leaving a widow or minor child or children, under the age of fifteen years, the following property shall not be deemed assets or administered as such, but shall be included and stated in the inventory of the estate, and signed by the appraisers without appraising the same:

First—One family sewing machine, to be retained by said widow absolutely as her own property, and all spinning wheels, weaving looms and stoves set up and kept in use by the family.

Second—The family bible, family pictures and school books used by or in the family of the deceased and books, not exceeding one hundred dollars in value, which were kept and used as part of the family library before the decease of such person.

Third—One cow, or if there be no cow, household goods, to be selected by the widow, or if there be no widow, by the guardian or next friend of such minor child or children, not exceeding forty dollars in value, or if there be no household goods such as the widow or guardian or next friend may desire to select, then forty dollars in money; all sheep to the number of twelve, their valuation not to be greater than seventy five dollars, and the wool shorn from them, and the yarn and cloth manufactured by the family; all flax in possession of the family intended for the use thereof, and yarn or thread cloth manufactured therefrom.

Fourth—All the wearing apparel and ornaments of the family and of the deceased, all the beds, bedsteads and bedding, cooking utensils and table-ware necessary for the use of the family, one clock, one side-

saddle and any other articles of personal property not to exceed one hundred dollars in value, which the widow, or if there be no widow, the guardian or next friend of such minor child or children, may select, to be valued by the appraisers. [65 v. 180, § 43.]

§ 6039. **Disposition of such property.** The said articles, except the wearing apparel of the deceased, shall remain in the possession of the widow, if there be one, during the time she shall live with and provide for such minor child or children. When she shall cease to do so, she shall be allowed to retain as her own her wearing apparel, her ornaments and one bed, bedstead and bedding for the same, and the other articles so exempted, and not consumed, shall then belong to such minor child or children. If there be a widow, and no minor child or children, then the said articles shall belong to such widow. [38 v. 146, § 44.]

§ 6040. **Allowance to the widow and children for their support.** The appraisers shall also set off and allow to the widow, and children under the age of fifteen years, if any there be, or if there be no widow, then to such children, sufficient provisions or other property to support them for twelve months from the death of the decedent; and if the widow or such children have, since the death of the deceased, and previous to such allowance, consumed for their support any portion of the estate, the appraisers shall take the same into consideration in determining the amount of the allowance. [38 v. 146, § 45.]

Such allowance confers a vested right of property, 4 O. S. 292, In case of her death her executor takes the balance of the fund. and the whole of it if not set off, *Id.* 14 O. S. 505. The allowance is a debt against the estate of the husband, 38 O. S. 480, and resort may be had to enforce its payment against land conveyed away by the deceased to defraud his creditors, 18 O. S. 234. Devise does not bar year's allowance, 3 O. S. 369, 39 O. S. 642, nor election to take under will, § 5964.

§ 6041. **Money to be set-off if necessary.** When there is not sufficient personal property, or property of a suitable kind, to set-off to the widow or children, as provided in the preceding section, the appraisers shall certify what sum or further sum, in money, is

necessary for the support of such widow or children. [38 v. 146, § 46.]

§ 6042. Allowance to the widow and children to be stated in separate schedule, etc. The appraisers shall not include in the inventory the provisions, property, or money set-off and allowed by them to the widow or children, but the same shall be stated in a separate schedule, signed by them, and returned, with the inventory, to the court, by the executor, or administrator. [38 v. 146, § 47.]

§ 6043. Allowance may be increased or diminished by the court. The probate court may, on petition of the widow, or other person interested, review the allowance made to the widow or children, mentioned in the preceding section, and increase or diminish the same and make such order in the premises as they [it] shall deem right and proper. [38 v. 146, § 48.]

Review of allowance by persons interested after her death, 21 O. S. 631. A person with whom the widow lived until her death and who supported and took care of her, incurring expense for her in her sickness, and who has a valid claim against her estate is a "person interested" in the matter of the review of her allowance, *Id.*

§ 6044. Inventory to be signed by appraisers, etc. Upon the completion of the inventory, it shall be signed by the appraisers, and a copy thereof shall be retained by the executor or administrator, and he shall return the original to the probate court. [38 v. 146, § 49.]

Appraisement not conclusive as to value, 18 Bull 276.

§ 6045. Appraisers' fees. The appraisers shall each receive one dollar per day for their services. [38 v. 146, § 50.]

Persons employed as commissioners to make partition of lands, or to assign dower, shall, for the time so engaged, and in going and returning, receive one dollar per day, but if the lands lie in more than one county they shall be entitled to one dollar and fifty cents per day; and persons called by an officer to appraise real or personal property on execution, replevin, or attachment, or to fix the value of exempted property, shall receive one dollar per day, except as otherwise specially provided, § 1300.

§ 6046. Inventory to be sworn to by the executor or administrator—form of oath, etc. Before receiving said

inventory by the probate court, the executor or administrator shall take and subscribe an oath or affirmation before the probate judge or his deputy, a justice of the peace, or other officer authorized to administer oaths required or authorized by law, stating that such inventory is in all respects just and true, that it contains a true statement of all the estate and property of the deceased, which has come to the knowledge of such executor or administrator, and particularly of all money, bank bills, or other circulating medium, belonging to the deceased, and of all just claims of the deceased against such executor or administrator, or other persons, according to the best of his knowledge. Such oath shall be indorsed upon or annexed to the inventory. [79 v. 27, 38 v. 146, § 51.]

Form of Inventory, Etc.—[*Affidavit under § 6033.*] State of Ohio, — county, ss: A. B., C. D. and E. F. appraisers of the personal estate of G. H., deceased, being sworn, say that they will truly, honestly and impartially appraise the estate and property of said decedent which may be exhibited to them, and perform the other duties required of them by law in the premises, as appraisers according to the best of their knowledge and ability.

A. B.,
C. D.,
E. F.,

Appraisers.

Sworn to and subscribed before me this — day of —, A. D., 188—.

I. J., Justice of the Peace,
[or other authorized officer.]

We, the undersigned, appraisers of the estate and property of G. H., deceased, after being duly sworn, have made an inventory and appraisement thereof, etc., as follows:

NO. OF ITEM.	PROPERTY APPRAISED.	VALUE.
100	Bushels wheat at 75 cts.	\$ 75
1	Wagon	70
25	Sheep, \$5	125
	Money; cash on hand, [§ 6037]	
	bank bills, 500	
	specie, 100	600
	[If there is no money say: No money of any kind.]	
	SUM TOTAL	\$870

THE FOLLOWING ARE THE DEBTS, ETC., OWING TO SAID ESTATE. (§ 6033, G.)

NAME OF DETOR.	HOW SECURED.	DATE.	WHEN INT. COMMENCED.	WHEN DUE.	SUM ORIGIN'LY PAYABLE.	INDORSEMENTS AND PAYMENTS AND WHEN.	VALUE OR SUM PROB- ABLY COL- LECTABLE.
Jno. Smi	Mortgage	M'ch 16, '87	1	7 M'ch 16, '88	\$ 1,000.	None.	\$500
Wm. Jones	Book acc't	Last item July 1, 1886		From date	50	None.	25
R. Brown	Note	June 1, 1887	From date	Jan. 1, 1888	500	Dec. 1, 1887, \$100.	Doubtful.

A. B.

C. D.

E. F., Appraisers.

The deceased having left a widow, Q. R., and S. T. and U. V., minor children under the age of fifteen years, [or either] we set off to them the following property without appraising the same, as directed by statute. [See § 6038, 6039.] [Signed.]

The following furniture and household goods were ——— by the widow of the deceased ——— her marriage with him, viz:——(required by § 8108 since repealed, 84 v. 132.)

The following is a schedule of property, etc., belonging to the estate of G. H., deceased, set off by the undersigned for the support of Q. R., his widow, and S. T. and U. V., his minor children under the age of fifteen [or either] for twelve months from the date of the death of said decedent. [See § 6040-6043.]

50 bu. wheat at 75 cts.	- - - - -	\$ 37 50
40 bu. potatoes at 20 cts.	- - - - -	8 00
Provisions already consumed [See § 6040]	- - - - -	15 00
Also cash, (there being no other property of a suitable kind to set off) [See § 6041.]	- - - - -	500 00
		<hr/>
		\$560 50

— day of —, 188—.

A. B., }
C. D., } Appraisers.
E. F., }

State of Ohio, — County, ss: Personally appeared before me, K. L., executor of the last will and testament [or administrator of the estate] of G. H., deceased, who, being sworn, says that the foregoing inventory and appraisement of the personal property of the said G. H., deceased, is in all respects just and true; that it contains a true and correct statement of all the estate and property of the deceased, which has come to the knowledge of the said K. L., and particularly of all money, bank bills, or other circulating medium belonging to the deceased, and all just claims of the deceased against the said K. L., or other persons according to the best of his knowledge.

Sworn to and subscribed before me this — day of —, A. D., 188—.

—, Probate Judge.

By —, Deputy Clerk.

Assets of Estate—What are not Assets.—Debts due from executors or administrators are assets, 4 O. 188; 17 O. 264; 2 O. S. 431; 27 O. S. 398; § 6068, 6069 (not worthless debts, 16 Bull 892); and purchase money from sale of land, 8 O. 217; and purchase money for land sold to pay debts or on partition, W. 119; 4 O. 126; 22 O. S. 79 (but not new assets, 17 O. S. 548); emblements or annual crops, § 6026; and profits of a continuing business, 15 O. S. 251; and arrears of interest on loan, 3 Bull 298; money and other effects found on body of unknown decedent, § 1227, 1228; property of deceased surviving partner, 38 O. S. 357; shares of stock of corporation, 1 O. S. 350; materials for completing contract to improve real estate on rescission of contract by executor, 8 O. S. 449; but trust funds held by decedents are not, 14 O. S. 193; nor rents before sale, 29 O. S. 230; nor pensions, 11 O. S. 214; nor damages for death by wrongful act, 28 O. S. 191; nor crops planted after death, W. 738; nor indemnity for suretyship, 15 O. 432; nor certificate of tax sale, 8 O. 216; nor money received by deceased in an official capacity, 4 W. L. M. 563; nor permanent leasehold renewable forever unless required for

payment of debts, 11 O. 355; 13 O. 384. When a surety of an administrator is appointed administrator *de bonis non*, his liability does not become assets, 27 O. S. 398.

§ 6047. How return of the inventory may be enforced. If any executor or administrator shall neglect or refuse to return such inventory, within three months after his appointment, the probate court shall issue an order requiring such executor or administrator, at a short day therein named, to return an inventory according to law, or to show cause, before the court, why an attachment should not issue against him. [81 v. 137; 38 v. 146, § 52.]

§ 6048. Repealed April 11, 1884. [81 v. 137.] This section provided that if after personal service the executor, etc., failed to return an inventory the court should issue an attachment against him and might commit him to jail, etc.

§ 6049. Revocation of letters on account of neglect to return inventory. If such order can not be served personally by reason of such executor or administrator absconding or concealing himself, or if, after personal service, as provided in the preceding section, such executor or administrator shall neglect for thirty days to make and return such inventory, the court may remove him, and new letters shall be granted, as provided in § 6017. [81 v. 137; 38 v. 146, § 53.]

Error and not appeal lies from order of removal, 15 O. S. 484; 4 W. L. M. 82.

§ 6050. Effect of such revocation. Such letters shall supersede all former letters testamentary or of administration, and shall deprive the former executor or administrator of all power, authority, and control, over the estate of the deceased; and shall entitle the person appointed, to take, demand, and receive the goods and effects of the deceased, wherever the same may be found. [38 v. 146, § 55.]

§ 6051. Prosecution of former bond by administrator *de bonis non*. In every such case of revocation, the bond, given by such former executor or administrator, shall be prosecuted, and a recovery had thereon, to the full extent of any injury sustained by the estate of the deceased, by the acts or omissions of such executor or administrator, and to the full value of all

the property of the deceased, received and not duly administered by such executor or administrator. [38 v. 146, § 56.]

§ 6052. **Executor or administrator imprisoned—how discharged.** Every executor or administrator committed to prison, as aforesaid, may be discharged by the court, on his delivering, upon oath, all the property of the deceased, under his control, to such person as shall be authorized by the court or judge to receive the same. [38 v. 146, § 57.]

§ 6053. **Proceedings when property of estate concealed or embezzled.** Upon complaint made to the probate court of any county, by the executor, administrator, creditor, devisee, legatee, heir, or other person interested in the estate of any deceased person, against any person or persons suspected of having concealed, embezzled, or conveyed away any of the moneys, goods, chattels, things in action, or effects of such deceased, the court shall cite the person or persons suspected forthwith to appear before it, and to be examined, on oath, touching the matter of the said complaint. [51 v. 354, § 1.]

Form of complaint. [Title.] To the judge of the probate court of _____ county, Ohio. The undersigned executor of the last will and testament of C. D., deceased, respectfully represents that he has good reason to suspect and does verily believe that A. B. of said county has concealed money, goods, chattels, things in action and effects of said deceased in fraud of the rights of the undersigned and others interested in the estate of said deceased. Wherefore he asks that a writ of citation may issue against the said A. B., and that he may be compelled to answer under oath touching the matters of this complaint, and that such other proceedings may be had in the premises as are authorized by law.

X. Y., executor, etc.

Citation, see forms under § 6011.

Entry. [Title.] This cause coming on to be heard upon the application of X. Y., executor of the last will and testament of C. D., deceased for a writ of citation against A. B. suspected of having concealed assets belonging to the estate of said deceased, and it appearing that the said A. B. has waived the issuing and service of the writ of citation and is willing to submit to an examination touching the matters embraced in the complaint of the said X. Y., executor, as aforesaid. It is therefore ordered that the matter of the examination of the said A. B., as prayed for in the said application, be and the same is referred to K. L., and that he proceed at once to said examination, and when the same is concluded, make his report thereof to this court without delay, according to law.

Notes.—§ 6053-6059 do not authorize summary proceedings by heirs, devisees, creditors, etc., against executors or administrators, 42 O. S. 325.

§ 6054. **Imprisonment for disobeying citation.** If any person so as aforesaid cited shall refuse or neglect to appear and submit to an examination, as aforesaid, or shall refuse to answer such interrogatories as may be lawfully propounded, the probate court shall commit such person to the jail of the county, there to remain in close custody until he or she shall submit to the order and direction of the court in that behalf. [51 v. 354, § 2.]

§ 6055. **Examinations to be in writing.** All such examinations, including as well questions as answers, shall be reduced to writing, signed by the party examined, and filed in the court before which the same was taken. [51 v. 354, § 3.]

§ 6056. **Examination of witnesses to be in writing, etc.** The probate court shall, if required by either party, swear such other witness or witnesses as may be offered by either party touching the matter of such complaint, and shall cause the examination of every such witness, including as well questions as answers, to be reduced to writing, signed by the witness, and filed as aforesaid. [51 v. 354, § 4.]

§ 6057. **Judgment of court thereon—Lien.** If upon any such examination, the probate court shall be of opinion that the person or persons accused is, or are guilty of either having concealed, embezzled, or conveyed away any moneys, goods, chattels, things in action, or effects of the deceased person, aforesaid, the court shall forthwith render judgment in favor of the executor or administrator of the estate, or, if there be no executor or administrator in this state, in favor of the state, against the person or persons so found guilty, for the amount of the moneys or the value of the goods, chattels, things in action, or effects so concealed, embezzled, or conveyed away, together with ten *per centum* penalty, and all the costs of such proceeding or complaint, which said judgment shall be a lien upon the real estate of the person or persons

against whom it is rendered, within the county from the rendition thereof. [51 v. 354, § 5.]

This section is unconstitutional in so far as it professes to authorize a judgment without any provision for trial by jury, or a right of appeal, in cases where the defendant does not admit the truth of the complaint, for the court has no constitutional power to try such a case. And on petition in error to reverse a judgment so rendered, it is error to order the written examinations taken before the probate court to be stricken from the record, for they are a legitimate part of the proceeding, without a bill of exceptions setting them forth, 19 O. R. 556.

§ 6058. Transcript to be filed in common pleas and execution issued. The executor or administrator in favor of whom any such judgment shall have been rendered, may forthwith deliver to the clerk of the court of common pleas of the county an authenticated transcript (which the probate judge is hereby directed to make out and deliver, on demand, to such executor or administrator), on which said transcript the clerk aforesaid shall immediately issue an execution of the said court of common pleas for the amount of the original judgment and costs, and the costs which may have accrued or may accrue thereon; and thenceforth proceedings on execution shall be, in all respects, as if the said judgment had been rendered in the said court of common pleas. [51 v. 354, § 6.]

§ 6059. If judgment in favor of the state, when prosecuting attorney to attend to it. If such judgment as aforesaid be rendered in the name of the state, and there be no executor or administrator within this state, the prosecuting attorney of the county shall cause the said transcript to be filed in the clerk's office, and proceed thereon to execution as before provided; and he shall pay the moneys realized upon such execution to the treasurer of the county, for the use of the said estate, reserving such compensation to himself only as the probate court may allow. [51 v. 354, § 7.]

§ 6060. Conveyances to evade these proceedings void. All gifts, grants or conveyances of land, tenements, hereditaments, rents, goods or chattels, and all bonds, judgments or executions, made or obtained with intent to avoid the purposes of these proceedings, or in

§ 6066. **What further time will be allowed.** The time allowed by the court, for the collection of the assets of the estate, shall not be granted, at any one time, for a period beyond one year from the time of the application; nor shall the time be extended beyond five years from the date of the administration bond. [38 v. 146, § 63.]

§ 6067. **Office of executor, etc., not to cease.** The office of the executor or administrator shall not cease with the time allowed by law, or the court, for the collection of the assets of the estate. [38 v. 146, § 64.]

§ 6068. **Discharge of debt in a will against an executor, etc., how construed.** The discharge or bequest, in a will, of any debt or demand of a testator, against any executor named in his will, or against any other person, shall not be valid as against the creditors of the deceased; but shall be construed only as a specific bequest of such debt or demand; and the amount thereof shall be included in the inventory of the credits and effects of the deceased, and shall, if necessary, be applied in the payment of his debts; and if not necessary for that purpose, shall be paid in the same manner and proportion as other specific legacies. [38 v. 146, § 65.]

§ 6069. **Naming a person executor not to discharge debt.** The naming of any person executor, in a will, shall not operate as a discharge or bequest of any just claim which the testator had against such executor; but such claim shall be included among the credits and effects of the deceased, in the inventory; and the executor shall be liable for the same, as for so much money in his hands at the time such debt or demand becomes due; and he shall apply and distribute the same, in the payment of debts and legacies, and among the next of kin, as part of the personal estate of the deceased. [38 v. 146, § 66.]

The same rule applies to administrators, 4 O. 188; 17 O. 264; 20 O. 479; 2 O. S. 431; 16 O. S. 273. The principle does not apply to one who is only conditionally liable to the estate; and the appointment as administrator *de bonis non*, with the will annexed of one who was surety on the bond of the previous executor, does not make a debt due from such executor assets

contemplation of any such examination or complaint as aforesaid, shall be utterly void and of no effect. [51 v. 354, § 8.]

§ 6061. New assets after return of first inventory. Whenever personal property, or assets of any kind, not mentioned in any inventory that shall have been made, shall come to the knowledge or possession of an executor or administrator, he shall cause the same to be appraised in manner aforesaid, and an inventory thereof to be returned, within two months after the discovery thereof; and the making of such inventory and return may be enforced in the same manner as in the case of the first inventory. [38 v. 146, § 58.]

See § 6046 n.

§ 6062. Assets to be collected, within one year, etc. The executor or administrator shall, as far as he is able, collect the assets of the estate, within one year after the date of the administration bond. [38 v. 146, § 59.]

§ 6046 n.

§ 6063. When more than eighteen months allowed to collect assets. If, from the situation of the assets belonging to the estate, more than eighteen months from the date of the administration bond is required for their collection, the court may, upon motion, and being satisfied thereof by the affidavit of the executor or administrator, extend the time for that purpose. [38 v. 146, § 60.]

§ 6064. Affidavit in such case. The affidavit required by the preceding section shall set forth the grounds of the application, the amount of money in the hands of the executor or administrator, applicable to the payment of the debts of the deceased; and that the executor or administrator has used due diligence to collect the assets and to pay the debts. [38 v. 146, § 61.]

§ 6065. When such further time will not be allowed. Further time shall not be allowed to the executor or administrator, to collect the assets of an estate that is solvent, if he has in his hands, at the time of his application, more than one hundred dollars in money, subject to the claims of creditors of the estate. [38 v. 146, § 62.]

§ 6066. **What further time will be allowed.** The time allowed by the court, for the collection of the assets of the estate, shall not be granted, at any one time, for a period beyond one year from the time of the application; nor shall the time be extended beyond five years from the date of the administration bond. [38 v. 146, § 63.]

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The same rule applies to administrators, 4 O. 138; 17 O. 284; 20 O. 479; 2 O. S. 431; 16 O. S. 273. The principle does not apply to one who is only conditionally liable to the estate; and the appointment as administrator *de bonis non*, with the will annexed of one who was surety on the bond of the previous executor, does not make a debt due from such executor assets

in the hands of such administrator by reason of such suretyship, 27 O. S. 398.

§ 6070. Mortgaged premises to be considered personal assets. Executor, etc., may take possession. When any mortgagee of real estate, or any assignee of such mortgagee, shall die without having foreclosed the right of redemption, the mortgaged premises, and the debt secured thereby, shall be considered as personal assets in the hands of his executor or administrator, and shall be administered and accounted for as such; and if the mortgagee or assignee shall not have obtained possession of the mortgaged premises in his lifetime, his executor or administrator may take possession thereof, by open and peaceable entry, or by action, in like manner, as the deceased might have done if living. [38 v. 146, § 67.]

Mortgage held by testator against person named as executor of his will personal assets, 17 O. 264. Mortgages of real estate must be recorded in the office of the county recorder and take effect from the time they are delivered for record, § 4133, of chattels must be forthwith filed with township clerk, etc., § 4150-4151, and refiled within thirty days next preceding the end of one year from the date of the original filing, § 4155.

§ 6071. Executor or administrator may discharge mortgage. Possession before redemption. In case of the redemption of any such mortgage, the money paid thereon shall be received by the executor or administrator of the deceased, and he shall thereupon release and discharge the mortgage; and until such redemption, the executor or administrator, if possession shall have been taken, either by himself or by the deceased, shall be seized of the mortgaged premises, in trust for the same persons, whether creditors, next of kin, or others, who would be entitled to the money, if the premises had been redeemed. [38 v. 146, § 68.]

§ 6072. How executor or administrator to foreclose mortgage. Any mortgage belonging to the estate may be foreclosed by the executor or administrator in the same manner that the decedent might have foreclosed the same. [38 v. 146, § 69.]

§ 6073. How executor, etc., may compound with debtor. When any debtor of a deceased person shall be unable to pay all his debts, the executor or administrator, with the approbation of the probate court, may compound with such debtor, and give him a discharge, upon receiving a fair and just dividend of his estate and effects, or such part of said debt, as said court may deem beneficial to those interested in the estate of said deceased person. [38 v. 146, § 70.]

SALE OF PERSONAL PROPERTY, AND THE SALE-BILL.

§ 6074. What personal property the executor or administrator may sell and when appraisement, etc., not required. The executor or administrator shall, within three months after the date of his bond, sell the whole of the personal property belonging to the estate, which is liable to the payment of debts, and is assets in his hands, to be administered, except promissory notes, and all claims, demands and rights in action which can be collected by him, and except bonds and stocks when the sale of them is not necessary for the payment of debts; and, also, except the following:

First—Such as the widow may desire to take at the valuation made by the appraisers, she securing payment to the executor or administrator therefor, as other purchasers.

Second—Such property as is specifically bequeathed shall not be sold until the residue of the personal estate has been sold, and is found by the executor or administrator to be insufficient for the payment of the debts of the estate.

Third—The executor or administrator may defer the sale of the emblements or annual crops raised by labor, which were not severed from the land of the deceased, at the time of his death, beyond the three months herein prescribed for the sale of the assets; and the same may be sold before or after they are severed from the land, at the discretion of the executor or administrator, and in the mode prescribed for the sale of other goods and chattels: provided, however, that when by the terms of any last will

the testator shall express a wish that there be no appraisement or sale of his personal property, the court admitting the will to probate may, at its discretion, direct the omission of either or both of said requirements; and may, also, at any subsequent period, upon the application of any party interested, require such appraisement and sale, or either of them, as the justice of the case may require. [38 v. 146, § 71; 45 v. 25, § 3.]

The right of the widow to take personal property at the appraisement is not limited to the time of making the appraisement, but she may at any time within the three months allowed the administrator for selling the same exercise this right until the property is put up for sale, and her right is not affected by any changes that may in the meantime have taken place in the market value of the property, 26 O. S. 538.

§ 6075. How property may be delivered to legatee. The property specifically bequeathed may be delivered over to the legatee entitled thereto, he securing the redelivery thereof, on demand, to the executor or administrator; otherwise the same shall remain in the hands of the executor or administrator, to be distributed or sold, as may be required by law and the condition of the estate. [38 v. 146, § 72.]

Form.—Know all men by these presents, that we, A. B., C. D. and E. F., are held and firmly bound to G. H., executor of the last will and testament [or administrator with the will annexed of the estate] of I. J., deceased, in the sum of [*double the value of the property*] for the payment of which we do jointly and severally bind ourselves.

The condition of the above obligation is such that, whereas, A. B. has received from the said G. H. the following property specifically bequeathed to him by the last will of said I. J. [*here describe the property.*] Now, therefore, if the said A. B. shall redeliver said property in as good order and condition as the same was in when received, in case such property shall be required for the payment of the debts of said decedent, then this obligation to be void, otherwise to remain in full force.

(Signed, etc.)

Executed in presence of_____

§ 6076. Personal property to be sold at public vendue, unless court otherwise order—not to be sold at private sale at less than appraised value, unless, etc. The sale of personal property shall be made at public vendue, after at least fifteen days' notice having been given in some newspaper in general circulation throughout the county, or by advertisement, set up in at least

five public places in the county where such sale is to take place: provided, however, that the court may for good cause extend the time for sale; and provided, further, that whenever the court shall be satisfied, upon good and sufficient proof, that it would be for the advantage of the estate of the decedent to sell any part of said personal estate not taken by the widow at the valuation made by the appraisers, at private sale, the court may authorize the executor or administrator to sell the personal estate, or any part or parcel thereof at private sale, either for cash or upon such other terms as said court, may in its discretion, direct; but such executor or administrator shall not be authorized to sell such property at private sale, at less than its appraised value, unless the probate court shall be satisfied by the affidavit of at least three disinterested persons that such property can not be sold at its appraised value, and that it will be for the best interest of the estate to sell the same at a less price, in which case such court may authorize such executor or administrator to sell the same for a less amount. Should any property thus ordered to be sold at private sale, be not sold within six months from the time of such order, or within such other time as may be fixed in the order, then said probate court may order the same to be sold at public auction in the same manner as though a private sale had not been ordered. [38 v. 146, § 73; 66 v. 30, § 1.]

Notice of sale.—The personal property belonging to the estate of A. B., deceased, will be sold by the undersigned at public auction, at the late residence of said deceased—on the ———day of ———commencing at ———o'clock—M. Terms of sale: Purchases amounting to three dollars or less to be paid in cash, above that sum notes at nine [or six] months with two good sureties will be taken.

—————188—————

C. D., Administrator.
[or Executor.]

Order to sell personal property at private sale. [Title.]
To A. B., administrator of the estate [or executor of the last will and testament] of C. D., deceased.

In pursuance of an order and decree of said court, this day made in the matter of the estate of C. D., deceased, you are hereby authorized and required to proceed to sell, at private sale at not less than ——— the appraised value thereof, the following goods and chattels belonging to the estate of said decedent, to-wit: [Here give list] upon the following terms, to-wit: ———

The deferred payments to bear interest from the day of sale, and to be secured by the promissory notes of the purchaser, with at least two amply responsible sureties thereon.

You will return this order within——months from this date and forthwith upon the execution of the same, together with your report thereon endorsed.

Witness my hand and the seal of said court, this——day of
——A. D. 188——

———Probate Judge.

§ 6077. Disposition of desperate claims. Upon proper proof being made by an executor or administrator to the probate court that any claim, debt or demand whatsoever belonging to the estate in his hands to be administered and accruing in the lifetime of the deceased, represented by such executor or administrator, is desperate: 1st, on account of the doubtful solvency or actual insolvency of the person or persons owing the same; 2d, on account of such debtor having availed him or herself of the bankrupt law of the United States; 3d, by reason of some legal or equitable defense which such debtor or debtors shall allege and make appear against the same; 4th, on account of the smallness of such claim and difficulty in its collection, either from the remoteness of the residence of the debtor, or the ignorance of the executor or administrator of such residence; the court may order such claim, debt, or demand to be compounded or sold, or to be filed in such court for the benefit of the heirs, devisees, or creditors of such deceased person as will sue for or recover the same, giving the creditors the preference, if they or any of them apply for the same before the final settlement of the estate, and such order of the court shall be a sufficient voucher to such executor or administrator. [47 v. 28, § 1.]

§ 6078. When notice of application to court for their sale necessary—publication of notice. In all cases where any of the claims or demands exceed the sum of ten dollars, or they all in the aggregate exceed the sum of five hundred dollars, the executor or administrator shall give notice of such intended application to said court for such order, at least three consecutive weeks previous to the day on which the application is to be

made, which notice shall be published in some newspaper having general circulation in such county; but if there be no newspaper in the county, then in some newspaper having a general circulation in said county; but if the claims are numerous they need not be described in such notice. [47 v. 28, § 2.]

§ 6079. **Public or private sales terms of compounding to be fixed in order.** If the court shall order a sale of such debts or demands, the executor or administrator shall give public notice as aforesaid, of the time and place of sale, three consecutive weeks previous to the day of sale, at which they shall be sold to the highest bidder; but the court may, in its discretion, order a private sale of such debts and demands, in like manner and for like reasons as provided for the private sale of goods and chattels; and if the court authorize the compounding of such claims or any of them, the court shall in the order fix the sum for which the same may be compounded. [47 v. 28, § 3.]

§ 6080. **How corporation stock sold.** The executor or administrator may sell either at public or private sale any railroad stock or other stock or shares in any corporation; but if he sell at private sale, it shall be for a sum not less than shall be for that purpose fixed by an order of the probate court. [60 v. 95, § 1.]

Sale without order of court not void, 11 Bull 67, 72.

§ 6081. **What credit to be given.** In all sales of personal property a credit shall be given by the executor or administrator, of not less than three and not more than nine months, unless otherwise ordered by the court, when the amount purchased exceeds three dollars. [38 v. 146, § 74.]

§ 6082. **Security to be taken.** Notes or bonds, with two or more approved sureties, shall in all cases of sale on credit, be taken by the executor or administrator. [38 v. 146, § 75.]

An administrator, in disposing of the personal property of the estate, without proper security for its payment, is guilty of a breach of official duty, and for any damage or loss thereby occasioned to the estate, he and his sureties are liable, 19 O. S. 87.

§ 6083. When executor or administrator not liable for loss. An executor or administrator shall not be responsible for any loss happening by the insolvency of the purchaser at such sale, or his sureties, if satisfactory evidence is adduced, that such executor or administrator proceeded with due caution, in taking security, and has used due diligence to collect said notes and bonds. [38 v. 146, § 76.]

§ 6084. Executor or administrator to make out list of articles liable to sale—Duty of clerk of such sale. The executor or administrator shall, previous to any public sale, make out a list of all the articles mentioned in the inventory, which are liable to sale, in the order they are set down in the inventory, whether the same are destroyed, taken by the widow at the appraisement, or otherwise forthcoming or not; and some suitable clerk, who is not interested in the estate, shall, at the time of sale, place opposite to each item upon said list, the names of the purchaser or purchasers, and the amount for which the item mentioned, or any part thereof, was sold; and if there be any articles on said list which shall not be sold, the clerk shall enter opposite to such article, the words "not sold," or the words "taken by the widow at the appraisement," or other statement, according to the fact; and if any articles be sold, which are not mentioned in the inventory, the same shall be so designated on the sale bill by the clerk. [38 v. 146, § 77.]

§ 6085. Construction of preceding section. Nothing contained in the preceding section shall be so construed as to require the executor or administrator to sell each article in the order in which the same is stated in the list taken from the inventory, nor to require articles, which are mentioned in the list, under a single item, to be put up and sold together; but that the articles mentioned in the sale bill shall be stated in the same order in which they are entered upon the inventory; so that the same may be readily compared by the court, and by parties interested in the estate. [38 v. 146, § 78.]

§ 6086. Sale bill to be signed by clerk, sworn to by the executor or administrator and filed—returns of private sale. The sale-bill shall be signed by the clerk, and the executor or administrator shall make oath before some officer, authorized to administer oaths, that the same is, in all respects, correct, to the best of his knowledge and belief; the sale-bill, with a certificate of such oath annexed thereto, shall be filed, by the executor or administrator, in the probate court, within six weeks from the time of such sale, and all returns of private sales shall be sworn to by the executor or administrator. [38 v. 146, § 79.]

Sale bill of the personal property belonging to the estate of A. B., deceased, sold at public auction by C. D., administrator of the estate [or executor of the last will and testament] of said decedent, on the — day of —, A. D. 188—.

NO. OF ITEM.	PROPERTY AS IN- VENTORIED.	VALUE AS INVENTORIED.		PURCHASER	PRICE.	
		\$	Cts		\$	Cts

I hereby certify the foregoing sale bill to be correct,
—, Clerk of sale.

State of Ohio, — County, ss: Personally appeared before me, the undersigned, Judge of the Probate Court of said county, C. D., administrator of the estate [or executor of the last will and testament] of A. B., deceased, who being sworn says that the foregoing sale bill of the personal property of the said deceased is in all respects correct according to the best of his knowledge and belief. C. D.

Sworn to and subscribed before me this — day of —, 188—, —, Probate Judge.

Form of return of private sale (§ 6412):

State of Ohio, — County, ss. In Probate Court. A. B., administrator of the estate [or executor of the last will and testament] of C. D., deceased, being duly sworn, says that in obedience to the foregoing order, he sold said goods and chattels, commencing on the — day of —, A. D. 188—, and closing on the — day of —, A. D. 188—, for the sum of — dollars, said sum being the appraised value of the same, and the highest price he could get after having made diligent endeavor to obtain the best price for said property.

A detailed schedule and list of said sale is herewith returned and filed, A. B., Administrator, etc.

Sworn to and subscribed before me, this — day of —, A. D. 188—, —, Probate Judge.

§ 6087. **How return of sale bill enforced.** If any executor or administrator shall refuse or neglect to return the said sale-bill, or fail to make return of any private sale, within six weeks after the sale, the same proceedings may be had against him and his sureties, as are provided in cases of neglect or refusal to return an inventory. [38 v. 146, § 80.]

§ 6047.

THE NOTICE TO CREDITORS: THE AUTHENTICATION AND
PAYMENT OF DEBTS, AND PAYMENT OF LEGACIES.

§ 6088. **When and how executor or administrator to give notice of his appointment.** Every executor or administrator shall, within three months after giving bond for the discharge of his trust, cause notice of his appointment to be published in some newspaper of general circulation in the county, in which the letters were issued, for three consecutive weeks. [38 v. 146, § 81.]

Form.—The undersigned has been duly appointed executor of the last will and testament [or administrator or administrator *de bonis non* of the estate] of A. B., deceased, late of—— County, Ohio.

—— day of ——, 188—

C——D——.

A notice of appointment is good, though the fact of the appointment is not expressly and explicitly stated therein, and the notice consists merely of a demand, officially signed by the administrator, that all persons indebted to the estate come forward and make payment; and that all persons having claims against the same are notified to present the same, 2 O. S. 156.

§ 6089. **Affidavit as evidence of notice.** An affidavit of the executor or administrator, or of the person employed by him to give such notice, being made, filed, and recorded, together with a copy of the notice, in the probate court, within one year after giving bond as aforesaid, shall be admitted as evidence of the time, place, and manner in which the notice was given. [33 v. 146, § 82.]

Form.—State of Ohio, —— county, ss. Personally appeared before me, a notary public in and for —— county, —— for the publishers of [naming newspaper] who, being duly sworn says that the annexed advertisement was published in the —— a newspaper printed and of general circulation

in said county for three consecutive weeks, commencing upon the _____ day of _____ 18____ and that each insertion was upon _____ day. [*If the newspaper has also a daily edition, add*] Affiant further says that a daily and weekly edition of said newspaper is published, and that the circulation of the daily in this county exceeds that of the weekly, and that the cost of publication in the daily does not exceed that of the weekly.

Sworn to and subscribed before me this _____ day of _____
A. D. 18____

Notary Public in and for _____ county, Ohio.

§ 6090. In what order debts to be paid. Every executor or administrator shall proceed with diligence to pay the debts of the deceased, and shall apply the assets to the payment of debts in the following order:

First—The funeral expenses, those of the last sickness, and the expenses of administration.

Second—The allowance made to the widow and children for their support for twelve months.

Third—Debts entitled to a preference, under the laws of the United States.

Fourth—Public rates and taxes, and sums due the state for duties on sales at auction.

Fifth—To every person who shall have performed manual labor in the service of the deceased, during his life time, out of any funds that shall come into his hands as such administrator or executor, before the payment of the general creditors, the full amount of the wages due to such person for such labor performed within twelve months preceding the death of the party for whom such labor was performed, not exceeding one hundred and fifty dollars.

Sixth—Debts due to all other persons. And if there be not enough, after paying any one of said classes, to pay all the debts of the next of the other classes, all the creditors of the latter class shall be paid ratably, in proportion to their respective debts; and no payment shall be made to creditors of any one class, until all those of a preceding class or classes, of whose claims the executor or administrator shall have had notice, shall be fully paid. [80 v. 78; 38 v. 146, § 83; 64 v. 211.]

First—Applies to estate of deceased married woman, though such deceased left surviving her a husband having property, 44 O. S. 184, see generally 10 Bull 338.

Second—See § 6040 n.

Third—See § § 3466, 3467 U. S. Rev. Stat.

Fourth—Taxes on real and personal property, § § 2734, 2845, 2847, 2849, 2851. Entry for taxation when some of executors reside without limits of city, 10 O. S. 431. Administrator having no personal assets may apply for order to sell lands to pay taxes, 8 O. 52. He is not authorized to pay taxes levied on real estate after decedent's death, 6 O. 227. Where administration of an estate is committed to two or more persons residing in different counties the "moneys, credits and investments" belonging to the estate must be listed for taxation under § 2735 in the county where the administrator having actual possession and control of the property to be listed resides at the time of listing, 42 O. S. 405.

§ 6091. Previous section not to affect lien. Nothing in the preceding section shall affect or impair any lien, legal or equitable, which any creditor or other person shall have upon the personal estate of the deceased during his life-time. [38 v. 146, § 84.]

Upon the decease of a debtor, his estate real and personal, stands for the payment of his general creditors alike, and one creditor can not by superior diligence acquire a superior right over the others, 1 O. S. 293. The individual creditors of a deceased member of a firm can not claim a preference in the decedent's individual estate as against the creditors of the firm, 6 O. 103. A creditor can not by making a levy subsequent to the death of his debtor, under a judgment obtained against him before his death, obtain a lien upon either his personal or real estate in preference to other creditors, 5 O. 221. A sale under such levy is void, 2 O. 287.

§ 6092. Claims against estate. How authenticated. Expenses of authentication. By whom allowed. Upon any claim being presented against the estate of any deceased person, the executor or administrator may require satisfactory vouchers in support thereof, and also the affidavit of the claimant, that such claim is justly due, that no payments have been made thereon, and that there are no set-offs against the same to the knowledge of such claimant; which oath may be taken before any justice of the peace, or other officer authorized to administer oaths, and the expense thereof shall be allowed by the executor or administrator, if the claim itself is allowed. [38 v. 146, § 85.]

Form.—State of Ohio, ———county, ss.—A. B., being duly sworn, says he is the owner of the annexed claim against the estate of C. D., deceased, that the same is justly due: that no payments have been made thereon [except such as appear thereon

credited] and that there are no set-offs against the same to the knowlege and belief of affiant.

A. B.——

Sworn to and subscribed by A. B. before me this——day of
——A. D. 188—.

Indorsement on claim.—Allowed as a valid claim against the estate of C. D., deceased. E. F. Administrator.

Notes.—Reasonable time allowed for examining claim, 18 O. 41. Presentation waived by taking issue on validity of claim, 36 O. S. 454. Necessity of presentation does not apply to revival of action, 29 O. 577. Allowance not conclusive of validity, 89 O. S. 112, § 6216. Presentation to administrator *de bonis non*, after allowance by administrator unnecessary, 39 O. S. 112. Where an administrator has seen and examined a claim against the estate, and is subsequently requested to allow it, which he refuses to do, such claim being present in the pocket of its owner, and the administrator so told, a formal presentation of the claim is not necessary, but may be presumed to be waived, 15 O. S. 15, see § 6097 n.; 15 Bull 198.

Held error not to admit letter of administrator in evidence to show rejection of claim or cross-examine witness as to letter, 1. C. C. R. 531.

§ 6093. **Doubtful claims against an estate to be referred to arbitration.** If the executor or administrator doubt the justice of any claim presented, and verified as aforesaid, he may enter into an agreement in writing, with the claimant, to refer the matter in controversy to three disinterested persons, who, if the claim does not exceed one hundred dollars, shall be approved of by a justice of the peace of the county in which the letters were issued; or if the claim exceed one hundred dollars, the referees shall be approved of by the probate judge of such county. [50 v. 126, § 1.]

Form of agreement to refer.—Whereas, the undersigned A. B., holds a claim against the estate of C. D., deceased, in the sum of —— dollars [*state the nature of the claim*] which he has presented for allowance to E. F., the executor of the last will and testament of [*or administrator of the estate of*] said decedent: Whereas said defendant E. F., disputes the validity of said claim [*or denies that the claim is a just debt against said estate.*] It is therefore agreed between the said A. B. and E. F., to refer the matter in dispute to the arbitration of G. H. I. J. and K. L., who shall be subject to the approval of M. N., of —— County [*in which letters were issued.*] [*But if the claim does not exceed one hundred dollars say*] who shall be subject to the approval of O. P., a justice of the peace, of —— County (*where letters were issued*), that this agreement with the approval of said referees shall be filed with said O. P. (*or any other justice of the county the parties may agree upon*) and such further proceedings shall be had before said justice as the statute provides.

Dated—— day of —— 188—

[Signed.]

Indorsement.—I approve the referees within named.
 — day of — 188— ——— *Probate Judge,*
or justice of the Peace of ——— county.

It is not necessary under this section that an action be brought on the award, but the court may enter judgment on the award when made, 11 Bull 117. Rejection of claim by executor on which suit has been brought does not estop him from submitting it to arbitration, *Id.*

§ 6094. How proceeded on if claim is less than one hundred dollars. If the amount of said claim so referred shall not exceed one hundred dollars, upon filing the agreement of reference and the approval of the referees, with such justice of the peace as the parties may agree upon, the justice shall docket the cause, appoint a day of trial, issue a citation for the referees, and subpœnas for witnesses; and the cause shall be regulated, and shall, in all things, proceed as is provided for arbitration before justices of the peace, except, that if judgment is rendered against the executor or administrator for the debt, damages or costs, it shall be rendered, and execution shall issue thereon, as in actions against executors and administrators. [38 v. 146, § 87.]

See § 6566-6572, arbitrations before justices of the peace.

§ 6095. *Id.* If it exceeds one hundred dollars. But if the claim so referred to arbitration exceed one hundred dollars, upon filing the agreement of reference, and the approval of the judge, with the clerk of the court of common pleas of the county in which the letters were issued, the said clerk shall docket the cause, and enter a rule, whether in vacation or in term, referring the matter in controversy to the persons so selected. [38 v. 146, § 88.]

§ 6096. Referees to report to court.—Proceedings, powers, and compensation of referees. Costs. The referees shall thereupon proceed to hear and determine the matter, and make their report thereon to the said court; and the same proceedings may be had before said referees, in all respects; the referees shall have the same powers, be entitled to the same compensation, as if the reference were made under the provisions made for arbitrations under a rule of the court of common pleas; and the court may set aside the

report of the referees, or appoint others in their places, or confirm such report, and adjudge costs, as in actions against executors and administrators; and the judgment of the court thereupon shall be valid and effectual, in all respects, as in other cases. [38 v. 146, § 89.]

When the probate judge approves of the referees, his duty and authority in the matter end, and the reference must be perfected in, and the report of the referees made to the court of common pleas and there disposed of, 15 O. S. 173. See § 5601 *et seq.*, 9 Bull 244; 11 Bull 117.

§ 6097. When claim barred if not sued within six months after rejection—What deemed a rejection. If a claim against the estate of any deceased person be exhibited to the executor or administrator, before the estate is represented insolvent, and be disputed or rejected by him, and the same shall not have been referred, the claimant shall, within six months after such dispute or rejection, if the debt, or any part thereof, be then due, or within six months after some part thereof shall have become due, commence a suit for the recovery thereof, or be forever barred from maintaining any action thereon; and no action shall be maintained thereon after the said period, by any other person deriving title thereto from such claimant. A claim shall be deemed disputed or rejected, if the executor or administrator shall, on presentation of the vouchers thereof, refuse, on demand made for that purpose, to indorse thereon his allowance of the same as a valid claim against the estate. [38 v. 146, § 90.]

Sufficiency of presentation, 6092, *n.* Refusal to allow a "rejection" within the meaning of act, (1 Cur. 708) 14 O. S. 122; must precede action, 13 O. 41. Error not to admit evidence as to rejection, 1 C. C. R. 531. Specific demand for indorsement of rejection or allowance need not be averred or proved, 23 O. S. 584. Limitation of action, six months after rejection, 4 O. S. 272; 2 W. L. M. 540; 2 C. C. R. 140. Limitation of six months does not apply when claim is allowed, 29 O. S. 569; 39 O. S. 112, 121. Setting aside the will does not excuse non-presentation, 38 O. S. 413.

Payment of part of a claim by an administrator without disputing the balance is a sufficient allowance of the whole claim, 39 O. S. 112. Verbal notice to the administrator of an estate by the widow of the deceased not to allow a specified claim against the estate is not sufficient proof of fraud on the part of

the administrator for afterward making such allowance, *Id.* Where the same person is administrator of the creditor as well as the debtor estate, no formal presentation or allowance of the claim within four years from the date of the bond of the administrator of the debtor estate is necessary, but in such case the claim is extinguished as soon as funds applicable to its payment come to the hands of the administrator, *Id.*

Under this section it is error in the court below to render judgment against the estate of the deceased person upon a claim due and disallowed more than six months prior to the commencement of the action. The failure of the executor to plead in bar such statute does not give a right to such judgment, 2 C. C. R. 140.

§ 6098. When claim shall be rejected at instance of heir or creditor—Action against administrator or executor—parties—costs. If any heir or creditor of a deceased person, or any person who has purchased, or claims to hold, by purchase or otherwise, from such heir, any lands or other property inherited by such heir from such decedent, shall file in the probate court of the county in which administration is taken out on any estate, a written requisition on the administrator or executor, to disallow and reject any claim presented for allowance, and whether said claim has been allowed or not, but which has not been paid in full, and shall enter into an undertaking, with sufficient surety, to be approved by the probate judge, conditioned to pay all costs and expenses of contesting such claim, in case it shall be finally allowed, such claim shall, in such case be disallowed and rejected by such administrator or executor, and the holder of such claim shall be required, within six months after such rejection of such claim, to bring his action against such administrator or executor, to enforce such claim, and if he recover, the judgment shall be against the said administrator or executor; and in such action, such heir, creditor, or other person claiming to hold such property, shall be made a party defendant with such administrator or executor, and shall have the right to plead and make any defense to such action which such administrator or executor could make; whenever such written requisition and undertaking shall be so filed in the probate court, the probate judge shall at once notify such administrator or executor thereof; and such adminis-

trator or executor shall thereupon at once notify the holder of such claim that such claim is rejected and disallowed; and if the proceedings shall have been commenced to sell the lands of such decedent to pay such claim, such proceedings shall be stayed, and no further order or decree taken therein, until after the validity of such claim shall have been determined, and if the plaintiff recover, the judgment shall be against the administrator or executor, but the costs shall be awarded against the party filing the requisition to disallow the claim. [74 v. 91, § 1]

Bond to reject claim.—Know all men by these presents, that we, A. B., C. D. and E. F., are held and firmly bound unto G. H., executor of the last will and testament [or administrator of the estate] of I. J., deceased, in the sum of ——— dollars to be paid to the said G. H., as aforesaid and his successors, for which payment well and truly to be made we bind ourselves, our heirs, executors and administrators severally and firmly by these presents. The condition of the above obligation is such that whereas A. B. has this day filed in the Probate Court of ——— County, Ohio, his written requisition on the said G. H., executor of the last will and testament [or administrator of the estate] of I. J., deceased, as aforesaid, to disallow and reject the claim of X. Y. against the estate of said I. J., amounting to the sum of ——— dollars. Now therefore, if the said A. B. shall well and truly pay all costs and expenses of contesting said claim, in case it shall be finally allowed as [decided by a court of competent jurisdiction to be] a valid and proper claim against said estate, then the above obligation to be void, otherwise to remain in full force and virtue.

Signed at ——— by us this ——— day of ——— 188-.

Executed in presence of, etc.

Requisition.—To G. H., executor of the last will and testament [or administrator of the estate] of I. J., deceased.

You will take notice that the undersigned, a creditor of the estate of I. J., deceased, does hereby require you to reject and disallow the claim of X. Y. against said estate for the sum of ——— dollars [*describe claim.*] Said claim having been as I am informed presented to you for allowance. A. B.

Entry. [*Title.*]—It appearing to the court that A. B., a creditor of the estate of said deceased has filed in this court a written requisition on G. H., the executor, etc., of said deceased, to disallow the claim of X. Y. against said estate, described in said requisition, and having entered into a bond to said G. H., as required by law in such case, which bond has been approved by the court, said executor, etc., is hereby ordered and directed to disallow said claim.

Note.—The party giving the bond must be made a party to the suit upon the rejected claim, and permitted to defend if he desires. or he will not be liable for the costs and expenses of such suit, 1 C. C. R. 572,

§ 6099. How debt due to executor or administrator to be paid. No preference. No part of the assets of the deceased shall be retained by an executor or administrator in satisfaction of his own debt or claim, until it shall have been proved to and allowed by the probate court; and such debt shall not be entitled to any preference over others of the same class. [38 v. 146, § 91.]

See 5 O. 72.

§ 6100. Procedure on presentation of executor's or administrator's claim to probate court. Whenever an executor or administrator shall present to the probate court for its allowance, any debt or claim of which he is the owner, against the estate which he represents, amounting to fifty dollars or more, the court shall fix a day, not less than four weeks nor more than six weeks from the presentation of said debt or claim, when the testimony touching said debt or claim, shall be heard; and the court shall forthwith issue an order, directed to said executor or administrator, requiring him to give notice in writing to all the heirs, legatees or devisees of said decedent interested in said estate, and such creditors as are therein named, which notice shall contain a statement of the amount claimed and designate the time fixed for hearing the testimony and shall be served upon the persons named in said order at least twenty days before the time fixed for such hearing; and if any of the persons mentioned in said order are non-residents of the county, service of said notice may be made upon them by publication for three consecutive weeks in a weekly newspaper, published or circulating in said county; all of the persons named in the order shall be deemed parties to the proceeding and any other person having an interest in the estate may come in and be made a party thereto. [70 v. 56, § 1.]

§ 6101. Hearing. Exceptions. Appeal. Upon the hearing as to the allowance of said debt or claim by the said court, exception may be taken to any decision of the court upon any matter of law, by any person who may be affected thereby, and bills of exception

may be taken and allowed, and proceedings in error had after a final order or judgment as is provided in other cases; and an appeal may be taken to the court of common pleas of the proper county from any order or judgment of the probate court allowing or disallowing such debt or claim or any part thereof, by any person who may be affected thereby, when the amount claimed by such executor or administrator exceeds one hundred dollars; and the matter so appealed shall be tried, heard and decided in said common pleas court in the same manner, and the proceedings therein shall be the same as nearly as may be practicable, as if the said common pleas court had original jurisdiction thereof, but without pleadings unless pleadings be ordered by the court to be filed; the person so appealing shall, within twelve days after the making of such order or judgment, give a written undertaking to the state, for the use of the persons who may be interested therein, with one or more sureties to be approved by the probate judge, conditioned that the person appealing shall pay all costs which may be awarded against him in the appellate court, and the bond shall be in such amount as the said probate judge may prescribe. [69 v. 105, § 2.]

§ 6102. How estate of deceased joint debtor liable. When two or more persons shall be indebted in any joint contract, or upon a judgment founded upon any such contract and either of them shall die, his estate shall be liable therefor, as if the contract had been joint and several, or as if the judgment had been against himself alone. [38 v. 146, § 92.]

This section abrogates the common law rule, 5 O. S. 586; 42 O. S. 299, 302. The surviving obligor or obligors in a joint contract may be joined with the personal representatives of a deceased obligor, in an action upon such contract, and a several judgment can be rendered against each, *Id.*

§ 6103. Preceding section not to affect rights of surety, etc. The preceding section shall not be so construed as to affect the rights of a surety, when certified as such, in a judgment rendered jointly against him and his principal. [38 v. 146, § 93.]

§ 6104. Debts not due may be paid upon rebate of interest. Debts not due may be paid by an executor or administrator, according to the class to which they may belong, after discounting the legal interest upon the sum paid for the time unexpired, if the claim does not bear interest before maturity. [38 v. 146, § 94.]

§ 6105. How and when execution may issue against an executor. No execution shall issue upon a judgment against an executor or administrator, unless upon the order of the court which appointed him, or unless the eighteen months allowed by law, or the further time allowed by the court for the collection of the assets of the estate, have expired; and if an account has been rendered, and settled by the court, execution shall issue only for the sum that shall have appeared, on the settlement of such account, to have been a just proportion of the assets applicable to the judgment. [38 v. 146, § 95.]

§ 6106. Costs in actions against an estate, when not recoverable. In suits for the recovery of money only, or of specific personal property against the estate, in which no provision is made herein in relation to costs, no costs shall be recovered against the executor or administrator, to be levied of his property or of the property of the deceased, unless it appear that the demand on which the action was founded, was presented within one year after his giving bond for the discharge of his trust, that its payment was unreasonably resisted or neglected, or that the defendant refused to refer the same, pursuant to the preceding provisions; in which case the court may direct such costs to be levied of the property of the defendant, or of the deceased, as shall be just, having reference to the facts that appeared on the trial. [38 v. 146, § 96.]

§ 6107. Executions against executor or administrator. Action upon suggestion of waste. Trial and judgment. All executions against executors and administrators, for debts due from the deceased, shall, except in the cases otherwise provided for herein, run against the goods and estate of the deceased in their hands; and

when any execution against an executor or administrator, for a debt due from the estate of the deceased, is returned unsatisfied, the creditor may bring an action, upon a suggestion of waste, against the executor or administrator, and if the defendant shall not show to the contrary, he shall be deemed guilty of waste, and shall be personally liable for the amount of such waste, when it can be ascertained; and if the amount of such waste can not be ascertained, the said executor or administrator shall be liable for the amount due on the original judgment, with interest thereon, from the time when it was rendered, and judgment and execution shall be awarded accordingly, as for his own debt. [38 v. 146, § 97.]

§ 6108. When executor or administrator to be liable to the suit of a creditor of deceased. No executor or administrator shall be liable to the suit of a creditor of the deceased until after the expiration of eighteen months from the date of his administration bond, or the further time allowed by the court for the collection of the assets of the estate; unless it be for the recovery of a demand that would not be affected by the insolvency of the estate; (1), or unless it be brought after the estate has been represented insolvent, for the purpose of ascertaining a claim that is contested; or unless the claim has been exhibited to the executor or administrator, and has been disputed or rejected by him. (2.) [38 v. 146, § 98.]

(1.) 39 O. S. 112. Petition must aver that eighteen months have elapsed or claim comes within exceptions, 8 W. L. M. 134. Action against surviving obligors and administrator of deceased obligor must aver the lapse of eighteen months, 12 O. S. 252. The section has no application to suits on administration bonds. 2 O. S. 575, see § 6210, 6212, and does not apply to revival of action before judgment, 29 O. S. 577, (2) § 6097.

§ 6109. When executor or administrator may proceed to pay debts without being liable for deficiency of assets. If any executor or administrator, who shall have given notice of his appointment, as provided in this chapter, shall not, within one year thereafter have notice of demands against the estate, which will authorize him to represent it insolvent, he may, after the expiration of said one year, proceed to pay the debts due from

the estate; and he shall not become personally liable to any other creditor, in consequence of any such payments made before notice of his demand, although the remaining estate should be insufficient to satisfy such last mentioned creditor. [38 v. 146, § 99.]

Overpayments made at executor's peril 5 O. 86, but he may recover back the excess as for money of his own paid by mistake, 5 O. 536.

§ 6110. And if whole estate be paid and afterwards other claims presented he shall not be liable therefor. If any executor or administrator shall have paid away, in manner aforesaid, the whole of the estate and effects of the deceased, before notice of the demand of any other creditor, he shall not be required, in consequence of such new demand, to represent the estate insolvent, but may plead that fact; and upon proving such payments, he shall be discharged. [38 v. 146, § 100.]

See 17 O. S. 242.

§ 6111. If so much paid away as to leave insufficient assets to satisfy subsequent claims—How far liable. If any executor or administrator shall have paid away, in manner aforesaid, so much of the estate and effects of the deceased, that the remainder shall be insufficient to satisfy any demand of which he shall afterward have notice, he shall be liable to pay, on such last mentioned demand, only so much as may then remain in his hands; and if there be two or more such demands exhibited, which shall, together, exceed the amount of assets remaining in his hands, he may represent the estate insolvent, and shall divide and pay over what shall remain in his hands, to and among such creditors as shall prove their debts, under the commission of insolvency, pursuant to such order as the court shall make in that behalf; but the creditors of the deceased, who shall have been previously paid by the executor or administrator, as aforesaid, shall not be liable to refund any part of the amount so received by them. [38 v. 146, § 101.]

§ 6112. If assets are exhausted in paying preferred claims,—Executor or administrator not liable for payment of subsequent claim. If it shall appear, upon settle-

ment of the administration account in court, that the whole estate and effects which have come to the hands of the executor or administrator, have been exhausted in paying the charges of administration, the allowance to the widow and children of the deceased, and the charges of his last sickness and funeral, or any other debts or claims, entitled by law to a preference over the common creditors of the deceased, such settlement shall be a sufficient bar to any action brought against the executor or administrator, by any creditor who is not entitled to such preference; and the executor or administrator may plead and give the same in evidence, although the estate may not have [been] represented insolvent. [38 v. 146, § 102.]

§ 6113. Limitation of action by creditors. Proviso as to claims accruing after four years. No executor or administrator, after having given notice of his appointment, as provided in this chapter, shall be held to answer to the suit of any creditor of the deceased, unless it be commenced within four years from the time of his giving bond as aforesaid, excepting in the cases hereinafter mentioned: provided, however, that any creditor whose cause of action shall accrue or shall have accrued after the expiration of four years from the time that the executor or administrator of such estate shall give or shall have given bond according to law, and before such estate is fully administered, may commence and prosecute such action at any time within one year after the accruing of such cause of action, and before such estate shall have been fully administered; and no cause of action against any executor or administrator shall be adjudged barred, by lapse of time, until the expiration of one year from the time of the accruing thereof. [38 v. 146, § 103; 45 v. 25, § 1.]

The allowance of further time to an executor or administrator to settle an estate does not withdraw a claim from the operation of this section; for the statute begins to run against creditors from the time the bond is given, and the notice is published, except when assets subsequently come into the hands of the personal representatives of the estate or the cause of action subsequently accrues, 2 O. S. 156; but the neglect of the creditor to present such claim for allowance, where-

by the estate of one surety is released, under the limitation of this section, from its direct liability, does not discharge a co-surety from the whole or any part of the debt; and an estate relieved from direct liability to the creditor under this limitation is nevertheless liable to contribute to the co-surety, who has paid more than his moiety of the debt, for the right of action among co-sureties accrues only when one has paid more than his proportion of the liability, 20 O. S. 337.

An action to charge an executor not required to give bond upon a claim against the estate of his testator can only be brought within four years from the time of his appointment as such executor, where due notice of his appointment has been published, as required by law, 38 O. S. 413; see 41 O. S. 417; see generally 1 C. C. R. 216, 531.

When a creditor takes from his debtor a note and also a mortgage on real estate to secure the same, and the debtor afterward die, and an action against his personal representative becomes barred by the lapse of time under this section, the creditor may nevertheless have his remedy in equity on the mortgage 11 O. S. 42. When a devisee or legatee accepts a devise or bequest, charged by the will with the payment of the debts of the testator, the law imposes on the devisee or legatee a personal obligation to pay such debt, and in an action to enforce such obligation the fact that the devisee or legatee is or is not also executor of the will makes no difference in the case. In such cases the statute limiting actions against executors and administrators to four years does not apply, 17 O. S. 288. In an action against an administrator on an account alleged to be due from the intestate, it is essential to prove a presentation and rejection of the claim or what is equivalent thereto; or to show some other reason why the administrator is liable to be sued notwithstanding the provisions of this section, 1 C. C. R. 531.

§ 6114. Assets received after four years liable to creditors. When assets shall come to the hands of an executor or administrator, after the expiration of the said four years, he shall account for, and apply the same, in like manner, as if they had been received within four years; and he shall be liable to an action, and to be proceeded against on account of such assets, by or for the benefit of any creditor, in like manner, as if the assets had been received within the said four years; provided, that such action or proceeding be commenced within one year after the creditor shall have notice of the receipt of such new assets, and not more than four years after the same shall be actually received. [38 v. 146, § 104.]

Money arising from the sale of land possessed by the decedent at the time of his death and sold for the payment of debts, and money received by the administrator from the guardian of the heirs of the deceased, under an arrangement made to save their

lands from sale are not *new assets* within the meaning of this section, and will not extend the limitation within which creditors are required to sue, 17 O. S. 518.

§ 6115. **Claim not due in four years may be presented to court, and if allowed may be paid or money held to pay the same or bond of heirs, etc., taken for payment.** Any creditor whose right of action shall not accrue within the said four years after the date of the administration bond, may present his claim to the court from which the letters issued, at any time before the estate is fully administered; and if, on examination thereof, it shall appear to the court that the same is justly due from the estate, it may, by the consent of the creditor and executor or administrator, order the same to be discharged, in like manner as if due, after discounting interest; or the court may order the executor or administrator to retain in his [hands] sufficient to satisfy the same; or if any of the heirs of the deceased, or devisees, or others interested in the estate, shall offer to give bond to the alleged creditor, with sufficient surety or sureties for the payment of the demand, in case the same shall be proved to be due from the estate, the court may, if it thinks fit, order such bond to be taken, instead of ordering the claim to be discharged as aforesaid, or requiring the executor or administrator to retain assets as aforesaid. [38 v. 146, § 105.]

§ 6116. **Allowance of court not conclusive, and executor or administrator not compelled to pay if disputed, unless, etc.** The decision of the court thereon shall not be conclusive against the executor or administrator, or other person interested to oppose the allowance thereof; and they shall not be compelled to pay the same, if disputed by them, unless it shall be proved to be due, in an action to be commenced by the claimant, within six months after the same shall become payable. [38 v. 146, § 106.]

§ 6117. **Action to be brought against executor or administrator; against heir if he has given bond.** The action for this purpose shall be brought against the executor or administrator, in case he shall have been required to retain assets therefor, or ordered to pay the same;

but if the heirs or others interested in the estate shall have given bond, as before provided, the action shall be brought on the bond. [38 v. 146, § 107.]

§ 6118. **Pleading when action brought on bond.** If the action be brought on the bond, the plaintiff shall set out his demand as in an action against the executor or administrator, alleging the liability of the defendants by reason of the bond, and the defendants may plead any defense that would be available to the executor or administrator. [38 v. 146, § 108.]

39 O. S. 579.

§ 6119. **Action of creditor against heirs, etc. not barred.** Nothing herein contained shall prevent or bar the action or suit of any creditor, against the heirs, next of kin, devisees, or legatees of the deceased, as hereinafter provided. [38 v. 146, § 109.]

§ 6120. **Limitation of actions against administrator de bonis non.** When any executor or administrator shall die, resign or be removed, or his letters shall have been revoked, or his power shall have ceased, without having fully administered the goods and estate of the deceased, and a new administrator of the same estate shall be appointed, the time allowed to the creditors of the deceased, for bringing their actions, shall be enlarged as follows, to-wit: to so much of the four years provided for the limitation of the said actions as shall have expired while the former executor or administrator continued in office, shall be added so much time after the appointment of the new administrator, as will make five years in the whole; and the new administrator shall not be held to answer to the suit of any creditor, commenced after the expiration of the said five years, excepting as is provided in the following sections. [38 v. 146, § 110.]

§ 6121. **Administrator de bonis non liable for two years after giving bond.** Every such new administrator shall, in all cases, be liable to the actions of the creditors for the space of two years after he shall have given bond for the discharge of his trust, although the whole time allowed to the creditors should be

thereby extended beyond the said five years. [38 v. 146, § 111.]

§ 6122. **Liable for four years, when.** If the former executor or administrator shall not have given notice of his appointment in the manner before prescribed in this chapter, the new administrator shall be liable to the actions of the creditors for the space of four years from the date of the bond given by such new administrator. [38 v. 146, § 112.]

§ 6123. **An administrator de bonis non to give notice of his appointment.** The new administrator shall give notice of his appointment in the same manner that is hereinbefore prescribed with respect to an original administrator; and if he shall fail so to do, he shall have no benefit of the limitations herein provided. [38 v. 146, § 113.]

§ 6124. **Barred claims not revived.** Nothing in the four preceding sections contained shall be so construed as to revive a claim barred under this or any other act, during the continuance in office of the original executor or administrator, or of any former administrator *de bonis non*. [38 v. 146, § 114.]

§ 6125. **To be further liable if new assets received.** When assets shall come to the hands of such new administrator, after any of the periods above limited for the commencement of suits against him, he shall account for the same, and shall be liable to suits and proceedings on account of such new assets, in like manner as is provided in this chapter with respect to any original administrator. [38 v. 146, § 115.]

§ 6126. **Cases where notice of appointment is not given within the proper time or evidence not perpetuated.** If notice shall not be given of the appointment of any executor or of any original administrator, or administrator *de bonis non*, within the three months hereinbefore prescribed for that purpose, or the evidence thereof shall fail to be perpetuated as hereinbefore provided, and can not be made, the court may, on the petition of the executor or administrator, order and allow such notice to be given at any time afterward, in which case the said four years, and other periods

of time, which are hereinbefore limited for the commencement of actions against executors and administrators, and for other purposes, and which begin to run as before directed, from the date of the administration bond, shall begin to run respectively from the time such order of court is made, if notice be published according thereto. [38 v. 146, § 116.]

§ 6127. **Liability for omission to give notice.** No order of court, made by virtue of the preceding section, shall exempt the executor or administrator, or their respective sureties, from their liability for any damages for which they would have been otherwise liable, by reason of the omission to give notice within the said three months. [38 v. 146, § 117.]

§ 6128. **If any legatee require legacy to be paid within four years, court may require him to give bond.** When any executor or administrator shall, within four years after having given bond for the discharge of his trust, be required, by any legatee or next of kin, to make payment in whole or in part, of his legacy or distributive share, the court may, if it thinks fit, require that the legatee or next of kin, first give bond to the executor or administrator, with surety or sureties to be approved by the court, with condition to refund the amount so to be paid, or as much thereof as may be necessary to satisfy any demands that may be afterward recovered against the estate of the deceased, and to indemnify the executor or administrator against all loss and damage on account of such payment. [38 v. 146, § 118.]

Form.—Know all men by these presents, that we, A. B., C. D. and E. F. are held and firmly bound unto G. H. in the sum of ———dollars: for the payment of which we do hereby jointly and severally bind ourselves:

Whereas, said G. H., executor of the last will and testament of I. J., has this day paid to said A. B. the sum of ———dollars on a legacy left to him by the said I. J., in his last will and testament, and four years not having expired from the time said G. H. gave bond for the discharge of his trust as said executor; Now the condition of the above obligation is such that if the said A. B. shall refund said amount paid to him, or so much thereof as may be necessary to satisfy any demands that may be recovered against the estate of said I. J., deceased, and shall indemnify the said G. H. against all loss and damage on account

of said payment, then this obligation to be void; otherwise to be and remain in full force and effect.

Signed by us this—— day of—— A. D. 18--.

Executed in presence of——

FOREIGN EXECUTORS AND ADMINISTRATORS.

§ 6129. **Foreign executors and administrators may be sued here.** An executor or administrator; duly appointed in any other state or country, or his legal representatives, may be prosecuted in any appropriate court in this state, in his capacity of executor or administrator. [45 v. 52, § 1.]

§ 6130. **How provision of this chapter apply to them.** The several provisions concerning the settlements of the estates of deceased persons, and also the remedies and proceedings herein given against executors and administrators appointed by the law of this state, shall apply to and be in full force and effect as to any foreign administrator or executor appointed by the laws of any other state or country, and residing in this state, or having assets or property in the same, and the several courts of probate, and courts of common pleas, and superior courts, shall have like power and authority over said foreign executor and administrator the same as if appointed by the laws of this state. [54 v. 3, § 1.]

§ 6131. **How proceeded against.** Any court of common pleas or superior court in this state may compel any foreign administrator or executor residing in this state, or having assets or property in the same, to account at the suit of any heir, distributee, or legatee, who is resident in this state, and may make distribution of the amount found in his hands to the respective heirs, distributees, or legatees, according to the law of the state granting said letters; and when there are suits pending, or any unsettled demands against said estate, the court may require a refunding bond to be given to said executor or administrator by the heirs, distributees, or legatees, entitled thereto in case the amount paid shall be needed for the purpose of paying debts of said estate. [54 v. 3, § 2.]

§ 6132. May be required to secure distributees and indemnify sureties. When any foreign administrator or executor has wasted, misapplied, or converted any of the assets of said estate, or has insufficient property to discharge his liability on account of said trust, or his sureties are irresponsible, any distributee, heir, or legatee, may compel him in any such court, to secure the amount that may be respectively due to them as aforesaid, and any of his sureties may require indemnity on account of their liability as bail, and the several provisional remedies and proceedings authorized in said courts, shall apply to the person and property of said administrator or executor, and said courts, shall have full power and authority to make any order or decree touching his property and effects, or the assets of said estate, necessary for the safety and security of those interested therein. [54 v. 3, § 3.]

§ 6133. May prosecute suits in this state. An executor or administrator, duly appointed in any other state or country, may commence and prosecute any action or proceeding, in any court in this state, in his capacity of executor or administrator, in like manner and under like restrictions, as a non-resident may be permitted to sue. [38 v. 146, § 242.]

A foreign executor who has given no bond in this state, and is a non-resident, can not appeal a case without giving bond and security, 6 O. 503.

ACTION FOR INJURY BY WRONGFUL DEATH.

§ 6134. Liability for causing death by wrongful act, etc. Whenever the death of a person shall be caused by wrongful act, neglect, or default, and the act, neglect, or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof; then, and in every such case, the person who, or the corporation which would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances, as amount in law to murder in

the first or second degree, or manslaughter. [49 v. 117, § 1.]

§ 6135. By whom and for whose benefit the action may be brought—Limit of damages—Limitation of action—Settlement after suit and apportionment of damages. Every such action shall be for the exclusive benefit of the wife or husband, and children, or if there be neither of them, then of the parents and next of kin of the person whose death shall be so caused, and it shall be brought in the name of the personal representative of the deceased person, and in every action, the jury may give such damages not exceeding in any case ten thousand dollars, as they may think proportioned to the pecuniary injury resulting from such death, to the persons respectively for whose benefit such action shall be brought; every such action shall be commenced within two years after the death of such deceased person. Such personal representative if he was appointed in this State, with the consent of the court making such appointment may at any time before or after the commencement of a suit, settle with the defendant the amount to be paid; and the amount received by such personal representative, whether by settlement or otherwise, shall be apportioned among the beneficiaries, unless adjusted between themselves by the court making the appointment in such manner as shall be fair and equitable, having reference to the age and condition of such beneficiaries and the laws of descent and distribution of personal estates left by persons dying intestate. [77 v. 207; 69 v. 22, § 2.]

Form of petition.—Probate court—county, Ohio.

A. B., as administrator of the estate [or executor of the last will and testament] of C. D., plaintiff vs. E. F. R. R. Co., defendant.

The plaintiff says that on the—day of—188- letters of administration on the estate of the said C. D., deceased were by the Probate court of—county, Ohio, duly issued and granted to this plaintiff, who thereupon duly qualified as such administrator and entered upon the discharge of the duties of his said office [or the plaintiff says that on the—day of—the will of C. D., deceased, was duly admitted to the probate court of—county, Ohio, in which will plaintiff was named as executor, and letters testamentary were thereupon issued to him by said court, and he thereupon duly qualified, etc.] and plaintiff sues as such administrator [executor.]

Plaintiff further says that defendant is a corporation incorporated under the laws of the state of——and was such corporation on the——day of——188- and for a long time previous thereto, and was during the time aforesaid, the owner of a railroad, and engaged as a common carrier of passengers upon said railroad for hire between the city of——and the——of——in the State of——, that upon the day last aforesaid, plaintiff's intestate [or testator] entered one of the cars of said defendant at——with the assent of the defendant, for the purpose of being conveyed thereby from the said——of——to the said——of——, having paid to said defendant the fare between the said points to-wit——dollars: That by the negligence of the said defendant, its agents or servants, the train of cars, in one of which cars the said C. D. was riding as aforesaid, was thrown from the track at——in the State of Ohio and the car in which said C. D. was seated was overturned and C. D. was thrown from his seat with great violence and was killed [or sustained injuries by which his death was caused] on the——day of——188-. Plaintiff further says that the said accident occurred and said injuries were inflicted without any negligence or fault on the part of said C. D. and, solely by the negligence and fault of the defendant and its agents, servants and employees:

That said C. D. left him surviving: his wife, G. H. and I. J. aged——years and K. L. aged——years, his only surviving children and next of kin.

Wherefore the plaintiff as such administrator [or executor] asks judgment against the said defendant in the sum of ten thousand dollars together with the costs of this action.

[Verification.]

Attorney for plaintiffs.

Notes.—The action can only be brought by the personal representatives, 26 O. S. 522. It may be brought for the benefit of the next of kin though they have no claims for support upon deceased, 25 O. S. 510. It may be brought on behalf of a bastard, 10 O. S. 272. The provisions of the section do not extend to cases where the death occurred outside of the state, 2 C. S. C. R. 82; 25 O. S. 667, nor to actions by an Ohio administrator under the statute of another state, 10 O. S. 121, nor where the death is caused by intoxication, 31 O. S. 359; 35 O. S. 89. The surviving husband of deceased wife is next of kin within the meaning of the act, 28 O. S. 191. The proviso (in a former statute) as to the time of bringing the action was held a condition and not a mere limitation and not affected by its amendment, 25 O. S. 629. The cause of action abates by the death of the wrong-doer, 37 O. S. 374, but death pending the action does not abate it, 1 Clev. R. 122. The action may be brought where defendant resides or can be served, 32 O. S. 595. It may be brought against the receiver of a railroad, 20 O. S. 137. It has been held that the action is barred in four years and begins to run from the time of the injury, 2 C. C. R. 45.

The risk of ascertaining the persons entitled to the benefit of a recovery resulting from an action brought under this act and the duty of making the distribution are not imposed upon the defendant, but upon the personal representative of the estate, 26 O. S. 522. The money realized from a judgment in such action is not to be treated as a part of the general estate of the deceased. It must be distributed in the manner provided in this

section and the personal representative in whose name the action is brought is a trustee for that purpose, 28 O. S. 191.

Damages are not general assets, 2 W. L. M. 593, but go to the widow and next of kin, *Id.* 1 D. 257; 7 O. S. 336. They are limited to the pecuniary injury sustained, 28 O. S. 191. None are given for bereavement and mental suffering, 28 O. S. 191. The reasonable expectation of what the next of kin might have received had he lived, is a proper subject for the consideration of the jury, 25 O. S. 510.

Pleading—The petition must show that there is a widow and next of kin, 2 W. L. M. 593, and who are the next of kin, 10 Rec. 444, but need not set forth the injury to the next of kin, 7 O. S. 336. Without a special averment damages are not recoverable for injury to the business of deceased, 2 W. L. G. 1.

Contributory negligence of deceased is a good defense, 1 Clev. R. 306, but not contributory negligence of next of kin, 24 O. S. 631. The rule as to contributory negligence in this State is that plaintiff is not required to allege in his petition that he was without fault "unless the other averments necessary to constitute a cause of action suggest the inference that he was guilty of contributory negligence," 40 O. S. 376. Contributory negligence of husband not imputed to wife, see 45 O. S. —; 19 Bull 204.

Evidence—Dying declarations of deceased not admissible, though defendant admits killing deceased and evidence tends to show facts sufficient to justify charge of homicide, 15 Bull 8. Where the action is brought for the benefit of surviving husband and child evidence that the husband had again married and that his second wife performed like services and duties and contributed in like manner as the first wife to the support of the family and accumulations of property is not admissible in mitigation of damages, 45 O. S. —; 19 Bull 204.

SALE OF REAL ESTATE FOR PAYMENT OF DEBTS AND DISTRIBUTION OF PROCEEDS.

§ 6136. When executor or administrator shall apply for sale of real estate to pay debts. As soon as the executor or administrator shall ascertain that the personal estate in his hands will be sufficient to pay all the debts of the deceased, with the allowance to the widow and children, for their support, twelve months, and the charges of administering the estate, he shall apply to the probate court or the court of common pleas for authority to sell the real estate of the deceased. [38 v. 146, § 119.]

Independent of statute there was no power of sale, 3 O. 553, and none existed between 1805 and 1808, 8 O. 159. Sale may be had to pay taxes, 8 O. 52; to pay executor's compensation, 8 O. S. 300; for support of widow and heirs, 18 O. S. 234; but not to settle disputes as to title, 23 O. S. 520. It must appear that there is an actual necessity for selling the land for

the payment of *bona fide* debts, *Id.* Where no authority exists in the will an executor can not sell real estate without first obtaining an order of court, 4 O. 129; and the power ceases when the estate is fully settled and all claims presumptively satisfied by lapse of time, 2 O. S. 241; or when an executor having accepted his trust resigns his office, 32 O. S. 35; but in case the executor resign the power to convey real estate conferred by the will may be transferred to an administrator with the will annexed, *Id.*, but in case the administrator then resign, his power under such will wholly ceases and a deed made by him afterward of land sold by him while in office conveys no title, *Id.* It is no bar to an action by an administrator to sell land to pay debts that the heir has without an order of court sold the same at private sale and applied the proceeds in satisfaction of preferred claims, 37 O. S. 532.

§ 6137. Where and how application shall be made. In order to obtain such authority, the executor or administrator shall commence a civil action in the probate court or the court of common pleas of either the county in which the real estate of the deceased, or any part thereof, is situate, or of the county in which were issued his letters testamentary or of administration. [38 v. 146, § 120.]

Jurisdiction of common pleas, 1 D. 585 (Act 1831.)

§ 6138. Administrator *de bonis non* to complete sale made by executor or administrator. If the executor or administrator, who shall commence such action, for the sale of real estate, shall die, resign, or be removed, or his powers shall cease at any time before the conveyance of the same, under an order of the court, the administrator *de bonis non* shall proceed with such sale, and may convey the land sold before or after his appointment, and may be required to give an additional bond in like manner as if such administrator *de bonis non* had filed the petition. [38 v. 146, § 152; 43 v. 20, § 1.]

§ 6139. When real estate fraudulently conveyed, liable to sale. The real estate liable to be sold as aforesaid, shall include all that the deceased may have conveyed with the intent to defraud his creditors, and all other rights and interests in lands, tenements, and hereditaments: provided, that lands so fraudulently conveyed, shall not be taken from any one who purchased, them for a valuable consideration, in good

faith, and without knowledge of the fraud; and no claim to lands so fraudulently conveyed, shall be made, unless within four years next after the decease of the grantor. [38 v. 146, § 121.]

§ 6140. **How executor or administrator to get possession of land fraudulently conveyed and avoid such conveyance.** If land is to be included in such action which has been so fraudulently conveyed, the executor or administrator may either before or at the same time, bring an action for the recovery of the possession of such land; or he may in his action for the sale thereof allege the fraud and have the fraudulent conveyance avoided therein; but when such land is included in the application before a recovery of the possession thereof the action shall be in the court of common pleas. [38 v. 146, § 122.]

Conveyance to be first set aside, 44 O. S. 497. Such proceeding must be commenced in the common pleas not in the probate court, *Id.*

§ 6141. **What petition for sale must contain.** The petition shall, in all cases, set forth the amount of debts due from the deceased, as nearly as they can be ascertained, and the amount of the charges of administration, the value of the personal estate and effects, and a description of the real estate, and the value thereof, if appraised. [38 v. 146, § 123.]

Form of petition to sell real estate.—Probate court of——— county. A. B., as administrator of the estate [or executor of the last will and testament] of C. D., deceased, plaintiff, vs. E. F., G. H. and I. J., a minor over fourteen years of age, K. L. and M. N., minors under fourteen years of age, sole heirs at law of C. D., deceased; Q. R., widow of said C. D., deceased, and S. T., defendants.

The plaintiff represents that he is the duly appointed and qualified administrator of the estate [or executor of the last will and testament] of C. D., deceased, late of the county of———, State of———: that valid debts of decedent amounting to———dollars have already been presented to plaintiff for payment [or that there are debts due from decedent as nearly as can be ascertained amounting to———dollars] a schedule of which debts is hereto attached marked exhibit A. That the costs of administration will amount to about———dollars, and that the total value of the personal estate and effects of said decedent is but———dollars, being wholly insufficient to pay the debts and costs aforesaid.

Plaintiff further represents that said C. D. died, seized in

fee simple of the following described real estate, situate in the county of _____ and State of Ohio, to-wit: [*Here describe the real estate.*] [*If the value of the real estate was ascertained in the inventory by the appraisers of the personal estate say*] Plaintiff represents that said real estate was appraised in accordance with the order of the probate court of _____ county, Ohio, by the appraisers of the personal estate of said decedent and that the amount of said appraisement is _____ dollars.

The said decedent died leaving as his sole heirs at law, the defendants, E. F., G. H. and I. J., who is a minor over fourteen years of age, K. L. and M. N., who are minors under fourteen years of age, and his widow, Q. R., who is entitled to dower in said premises. Plaintiff represents that S. T. claims to hold a mortgage on said premises for _____ dollars, executed by said C. D. with his said wife, Q. R. Plaintiff therefore prays that the dower of said Q. R. be assigned and set off to her in said premises, that said S. T. be required to answer setting forth more fully the amount and date of said mortgage lien, and that he may be authorized and ordered to sell said premises subject to said dower estate according to the statute in such case made and provided, and for all other proper orders and relief in the premises.

[*Verification.*] _____ Attorney for plaintiff.

§ 6142. **Necessary parties.** In such action the widow of the deceased, and the heirs, devisees, or persons having the next estate of inheritance from the deceased, and all mortgagees and other lienholders, whether by judgment or otherwise, of any of the lands sought to be sold, and all trustees holding the legal title thereto or to any part thereof; and when a fraudulent conveyance is sought to be set aside in such action, all persons holding or claiming thereunder shall be made parties. [18 v. 146, § 124; 55 v. 157, § 1.]

A mortgagee was not a necessary party to the action to sell lands prior to 1858, 11 O. S. 486, and a purchaser at judicial sale held them under the law as it then stood discharged of liens for debts of the intestate, 8 O. 217, but under the amendment of 1858 the lien of a mortgagee who is not made a party thereto remains unaffected by the order of sale and the proceedings thereunder, 19 O. S. 472. Proceedings are void as to heirs not made parties, 12 O. 253. In petition to sell land fraudulently conveyed it was held that defrauded creditors could not be joined, 2 Clev. R. 137. Surviving husband claiming curtesy in deceased wife's land, see 17 Bull 320.

§ 6143. **Service—Waiver of—Consent of guardian.** Service, either actual or constructive, shall be made in the same manner as in other civil actions: provided, that if all persons in interest consent, in writing, to the sale, service of process may be dispensed

with ; and legal guardians may sign such consent for their wards, except guardians of the person only of minors ; or, unless otherwise ordered by the court, the summons may be served by the plaintiff or other person, by copy personally, and the return of such service shall be verified by the oath of the person who makes the same ; and all proceedings in the action in either court shall be the same as in other civil actions, except as otherwise herein provided. [38 v. 146, § 125, 126, 128 ; 76 v. 110, § 1.]

Waiver of summons and consent to sale. [Title.]—We, the undersigned, parties-defendant to the petition in said cause, waive issuing and service of summons and voluntarily enter our appearance as such defendants, and we do hereby consent to the sale of the real estate described in said petition.

Affidavit to obtain publication. [Title.]—A. B., the above named plaintiff, being duly sworn says, that E. F., defendant in this action is a non-resident of the State of Ohio, and service of summons can not be made upon him in this State, that the residence of the defendant, G. H., is unknown and can not with reasonable diligence be ascertained, and service of summons can not be made upon him, and that the case is one of those mentioned in § 5048 of the Revised Statutes of Ohio.

Notice to parties by publication. [Title.]—Case No. ———, Probate Court, ——— county, Ohio. E. F., who resides at ———, ——— county, State of Indiana, and G. H., whose residence is unknown, will take notice that A. B., administrator of the estate of C. D., deceased, on the ——— day of ———, 188—, filed his petition in the Probate Court of ——— county, Ohio, alleging that the personal estate of said decedent is insufficient to pay his debts and the charges of administering his estate ; that he died seized in fee simple of the following described real estate to-wit: [here describe the real estate] that Q. R., the widow of said decedent, is entitled to dower in said real estate, and that S. T. claims to hold a mortgage thereon for ——— dollars. The prayer of the petition is for the assignment of dower in said property, that S. T. be required to answer setting forth the particulars of his mortgage lien thereon and that said property be sold to pay the debts and charges aforesaid. E. F. and G. H. are hereby notified that they have been made parties-defendant to said petition and that they are required to answer the same on or before the ——— day of ——— 188—.

Affidavit of publication. See § 6089.

Affidavit of proof of mailing notice. [Title.]—X. Y., being duly sworn, says that on the ——— day of ———, 188—, he deposited in the post-office at ——— post-paid directed to E. F., ——— county, Indiana, one copy of the Cincinnati Commercial-Gazette of date ———, 188—, containing among other things a publication of which the following is a true copy [here copy notice of publication.]

Answer of widow. [Title.]—And now comes Q. R., widow of said C. D., deceased, and for answer to plaintiff's petition, waives issue and service of summons herein, consents to the sale of the premises in said petition; waives the assignment of dower in said premises described to her by metes and bounds or in rents and profits, and asks the court to have said premise sold free of her dower and to allow her in lieu thereof such sum of money out of the proceeds of the sale as the court may deem the just and reasonable value of her dower interest in said premises. [Signed.]

Answer and cross-petition of defendant.—[Title.] Now comes S. T., one of the defendants in the above entitled cause, and says he admits that the plaintiff is the duly appointed and qualified administrator of the estate of C. D., deceased, but knows nothing of the other matters and things set forth in said petition, and therefore denies the same. And by way of cross-petition this defendant says that on the——day of——188—; said C. D. executed and delivered to S. T., his certain promissory note dated —— day of ——, 188—, for the sum of —— dollars, payable to the order of S. T. and due one year after date, with interest from date, a copy of which note with all indorsements and credits thereon is made a part of this cross-petition and is as follows: [copy of note.] That in order to secure the payment of said note, the said C. D. and Q. R., his wife, executed and delivered to this defendant a mortgage, dated——day of——188—, upon the following described premises [here describe the premises, or on the premises described in the petition for sale in this cause.] That on the——day of——188—, at——o'clock, —. M., said mortgage was delivered to the Recorder of——county, State of Ohio, and was recorded on the same day in book——page——, of the mortgage records of said county. That in said mortgage it was provided [here give defeasance clause.] Defendant says that said mortgage has become absolute, that no part of the sum mentioned in said note and mortgage has been paid, and that there is now due and owing the defendant thereon the sum of——dollars, with interest from the——day of——, 188—, wherefore defendant prays that said premises may be sold, that his debt and interest be paid in full out of the proceeds of the sale and that he may have all other and proper relief.

Answer and cross-petition of Building Association. [Title.] Now comes the defendant, the Excelsior Loan & Bldg. Association of——, and states that it is duly incorporated under the laws of Ohio for the purpose of loaning money among its members for use in buying lots, or building, or repairing houses and for other purposes, that the said C. D., deceased, was one of its members; that on or about the——day of——, 188—, it paid to the said C. D. the sum of——dollars, the estimated value of——shares on a contract then and there made and entered into, by which said C. D. agreed to repay said sum to this defendant in weekly installments of dues, interest, premiums and fines and according to the terms and conditions of a certain mortgage deed hereinafter set forth. This defendant further says that in order to secure the performance of said contract and to enable it to enforce the payment of the sums coming due and payable thereunder, the said C. D. and E. D., his wife, on

or about the—day of—, 188—, executed and delivered to said Association, its successors and assigns, their certain mortgage deed with release of dower for the following described real estate [*here describe real estate.*] That said mortgage deed contained the following conditions: [*copy defeasance clause.*] Said Association on the—day of—, 188—, at— o'clock, delivered said mortgage to the Recorder of— county, Ohio, and said mortgage was on the—day of—, duly recorded in Book—, page—, of— County records, and the claim of said association thereby became and still is the first and best lien upon said premises. This defendant further says that neither said C. D. nor did his legal representatives comply with the terms and conditions of said mortgage and did not make payment so as aforesaid by him agreed, that they have made no payments since—day of—, 188—, and that up to and inclusive of—day of—, said C. D. and his representatives are delinquent in interest—dollars, in premiums—dollars, in fines—dollars, making a total of—dollars. Wherefore defendant prays that an account may be taken of the amount due on said mortgage, when a decree shall be taken that said premises may be sold to satisfy said mortgage and the interest, premiums and fines due at the time, and for all proper relief.

Notes.—Service on infants, § 5047. Constructive service, § 5048-5051. When service unnecessary, § 5043. Return of summons, § 5039. Time of filing pleadings, § 5097. Guardians could appear for minors not named in the petition under the act of 1824, 7 O. (pt. 1) 198; 7 O. (pt. 2.) 138.

§ 6144. When guardian ad litem to be appointed— Such guardian can not waive notice, etc. It shall not be necessary, unless the prayer of the petition for a sale is contested, to appoint guardians *ad litem* for infant heirs or devisees or other persons having the next estate of inheritance from the deceased who are defendants; and no such guardian shall have authority to waive notice or service of summons. [33 v. 146, § 127.]

Order appointing guardian ad litem. [Title.]—This cause coming on this day to be heard, and it appearing to the court that K. L. and M. N., minor defendants, have been duly and legally served with process herein, and notified of the pendency and prayer of plaintiff's petition, the court on motion of X. Y., counsel for —, hereby appoints O. P. guardian *ad litem* for said minor defendants, and thereupon the said O. P. appearing in open court accepts said appointment.

Answer of minor defendants by guardian ad litem. [Title.] Now come K. L. and M. N., minor defendants, hereto by O. P., guardian *ad litem*, heretofore appointed in this cause, by this court, and for answer to the petition deny all the allegations therein contained; and further say, that they are of tender years and not acquainted with the law in such cases, and therefore ask the court to protect their rights in this case, and for such relief as may be just.

Notes.—See § 5003, 5004, Code of civil procedure. Guardian *ad litem* could appear for infants not served, 15 O. 715; 3 O. S. 494; 12 O. S. 49. His answer has the effect of a general denial 23 O. S. 520. See § 5078, Code of Civil Procedure.

§ 6145. Court to settle priorities of liens in such cases. The probate court or court of common pleas in which such action may be pending, shall have full power to determine the equities between the parties and the priorities of lien of the several lien-holders on said real estate, and to order a distribution of the money arising from the sale of such real estate, according to the respective equities and priorities of lien as found by the court. [55 v. 157, § 2.]

See 42 O. S. 53; 20 O. S. 539, 549; 3 Bull 891.

§ 6146. Persons interested may give bond and prevent sale. An order for the sale of the real estate shall not be granted if any of the persons interested in the estate shall give bond to the executor or administrator, in a sum and with sureties to be approved of by the court, with condition to pay all the debts mentioned in the petition that shall eventually be found due from the estate, with the charges of administering the same, and the allowance in money to the widow, so far as the personal estate of the deceased shall be insufficient therefor. [38 v. 146, § 129.]

Form of bond.—Know all men by these presents, that we, A. B., C. D. and E. F., are held and firmly bound unto G. H., executor of the last will and testament [or administrator of the estate] of I. J., deceased, in the sum of ——— dollars, to the payment of which we hereby jointly and severally bind ourselves, our heirs, executors and administrators. The condition of this obligation is such that whereas the said G. H., as executor [or administrator] as aforesaid, on the ——— day of ———, made an application to the probate court of ——— county, Ohio, for an order to sell the real estate of said decedent alleging that the personal estate of said decedent was insufficient for the payment of his debts and the charges of administering his estate. Now if the said A. B. shall pay all the debts mentioned in the petition that shall eventually be found due from the estate, with the charges of administering the same, and the allowance in money to the widow so far as the personal estate of the deceased shall be insufficient therefor, then this obligation to be void, otherwise to be in full force and effect. [Signed, etc.]

Executed in presence of

The bond is binding though executed after order of sale, 81 O. S. 78.

§ 6147. When court to order real estate to be sold—Terms of sale. If the court is satisfied that it is necessary to sell real estate of the deceased to pay his debts, it shall order the real estate, or so much thereof as may be necessary for the payment of the debts, to be sold by the executor or administrator, upon deferred payments, not exceeding two years, with interest. [38 v. 146, § 139.]

An order of court made after its jurisdiction is exhausted can not be cured by entering the order *nunc pro tunc* as of a prior date, 3 O. 553. Order for sale before return of appraisement, 5 O. 447, or made after sale, 4 O. 5, is void. And a sale of lands excepted from the order, 4 O. 5, or without an order is void, 16 O. 188; W. 208. So is a sale under order of foreign court, 1 O. 519, unless assented to, 13 O. 368; 1 O. S. 390. Order of sale will not be reversed for lack of journal entry, 37 O. S. 532.

§ 6148. The estate of the heirs in the land set off to the widow, may be sold. The court may include in its order of sale, the title of the heirs or devisees of the deceased, in the premises set off to the widow for her dower, which may be sold subject to the life estate of the widow therein. [38 v. 146, § 131.]

§ 6149. The whole to be sold when a partial sale would injure the residue. If it shall be represented in such petition and shall appear to the court that it is necessary to sell some part of the real estate, and that, by such partial sale, the residue of the estate, or some specific part or piece thereof, would be greatly injured, the court may order a sale of the whole of the estate, or of such part thereof as the court shall think necessary and most for the interest of all concerned therein. [38 v. 146, § 132.]

§ 6150. Executor or administrator to give bond to account for surplus. When, in cases named in the next preceding section, the executor or administrator is ordered to sell more land than is necessary for the payment of the debts, he shall before the sale, give bond with sufficient sureties payable to the state, conditioned to account for all the proceeds of the sale that shall remain, after payment of the debts and charges for which the land shall be sold, and to dispose of the same according to law. [38 v. 146, § 133.]

Form of bond.—Know all men by these presents, that we, A. B., C. D. and E. F., are held and firmly bound unto the state of Ohio in the sum of——dollars, to the payment of which we do hereby jointly and severally bind ourselves, our heirs, executors and administrators.* The condition of this obligation is such that, whereas in a certain cause pending in the probate court of the county of——and state of Ohio, wherein A. B., executor of the last will and testament [or administrator of the estate] of G. H., deceased, is plaintiff and I. J. and others are defendants, the said A. B. has been ordered by said court to sell more real estate than will be necessary for the payment of the debts of said decedent and the charges of administering his estate. Now, if the said A. B. shall account for all the proceeds of the real estate so ordered to be sold, that shall remain after the payment of the debts and charges aforesaid, and dispose of the same according to law, then this obligation to be void, otherwise to be in full force. (Signed, etc.)

§ 6151. And give additional bond to secure further assets if required in what court. The court may also require of any executor or administrator, if it shall deem it necessary, before such sale, to give an additional administration bond, to secure the further assets arising from the sale of the real estate, and the bond mentioned in this section, and the bond mentioned in the next preceding section, shall, when so ordered to be given, be given in the court from which the letters were issued, and if the action is pending in another court, the latter court shall proceed no further till there is filed therein a certificate from the former court, under the seal thereof, that such bond has been given as ordered. [38 v. 146, § 134.]

§ 6152. When assets will be marshaled in conformity with the will. If there should be in the last will of the deceased any disposition of his estate for the payment of his debts, or any provision that may require or induce the court to marshal the assets, in any manner different from that which the law would otherwise prescribe, such devises, or parts of the will, shall be set forth in the petition, and a copy of the will shall be exhibited to the court, and the assets shall be marshaled accordingly, so far as it can be done, consistently with the rights of the creditors. [38 v. 146, § 135.]

§ 6153. Costs when there are objections to granting order for sale. If any party shall, in his answer, object to the granting an order for the sale of the real estate,

by an executor or administrator, and it shall on hearing appear to the court that either the petition or the objection thereto is unreasonable, it may, in its discretion, award costs to the party prevailing on that issue. [38 v. 146, § 136.]

§ 6154. **Appraisement when no dower is to be assigned.** If the deceased did not leave a widow, entitled to dower in the estate to be sold, and an appraisement of such real estate is contained in the inventory, the court may order a sale according to said appraisement, or order a new appraisement. If the court do not order a new appraisement, the appraisement set forth in the inventory shall be deemed the appraised value of the real estate; but if the court order a new appraisement, the value returned by such appraisers shall be deemed the appraised value of the real estate. The order of sale and the order for the appraisement may be made at the same time, if no assignment of dower is required. [38 v. 146, § 137, 138, 139.]

§ 6155. **Appointment of appraisers—Duty as to dower and homestead. Copy of order to issue.** Except when there has been a valuation of the real estate in the inventory and the court dispense with another appraisement, the court shall, upon finding that a sale is necessary, appoint three judicious, disinterested men of the vicinity, who are freeholders, to appraise the lands at their true value in money; and if the deceased left a family homestead, and a widow or a minor child or children, or both, entitled to have a homestead set off pursuant to the provisions of § 5437, then the court shall order the appraisers to first proceed to set off and assign such homestead, and, if the deceased left a widow entitled to dower in the premises, the court shall also order said freeholders to set off and assign to her, in each or in one or more of the tracts of land, by metes and bounds, one equal third part of the whole lands in which she is entitled to dower, as and for such dower, and to appraise the whole premises, either as a whole or in parcels, subject to such homestead and dower, or in case there is no such homestead, then subject to such dower so assigned, and in case there is no such dower, then

subject to such homestead; but if on view, the appraisers find that the dower cannot be so assigned, they shall then assign such dower specially as of the rents and profits; and if the lands lie in two or more counties, the court may, if it think fit, appoint appraisers in more than one of the counties. In all cases a copy of the order to be executed shall be issued to the executor or administrator and any lands subject to such homestead and dower, or either, may be sold pursuant to the provisions of this chapter. [83 v. 105; 66 v. 349; 38 v. 146, § 141.]

Judgment and order to appraise. [Title].—This cause coming on this day to be heard, upon the petition of the plaintiff filed for the purpose of having the real estate therein described sold to pay the debts and costs of administration of the deceased, as also upon the return of the summons issued, and the answer of O. P., guardian *ad litem*, appointed for the minor defendants herein, and the answers of E. F., G. H. and I. J., defendants above named, as well upon the answer of Q. R., widow of said deceased, and the answer and cross-petition of the defendant, S. T., and the court being fully advised in the premises find: That all the defendants herein have been legally served with process [or have waived the issuing and service of process and entered their appearance herein *as the case may be*] and have been duly notified of the pendency and prayer of the petition as prescribed by law. And the court further finds that Q. R., widow of the said C. D., deceased, waives as in her answer herein set forth, assignment of her dower in said premises and desires that the same may be sold free and clear of her said dower, and that the court set-off to her out of the proceeds of the sale of said premises such a sum of money as may be just and reasonable in lieu of her said dower interest. And the court find, that it is necessary to sell the real estate in said petition described to pay the debts and charges of administration of the estate of said decedent. Wherefore, it is considered and ordered by the court that B. A., D. C. and F. E., three judicious and disinterested men, free-holders of this county, after being first duly sworn, and upon actual view of the premises in said petition described, appraise the same at its cash value, free of the dower of the said Q. R., widow of the deceased, and return the same to this court for confirmation.

Note.—Dower protected without answer, 1 O. S. 293. She may elect to be endowed out of proceeds of sale, § 5719. Her election by answer operates as a release of dower to purchaser, § 5720. The guardian of an insane widow may elect for her, § 5721. See § 5434-5443, Code Civil Procedure, provisions relating to homestead.

§ 6156. Vacancy in office of appraisers, how filled. When any person appointed by the court as an appraiser, fails to discharge his duties, the probate judge or any

justice of the peace of the county in which the lands to be appraised are situate, may, at the instance of the executor or administrator, appoint an appraiser, of which appointment the officer appointing shall make and sign a certificate which shall be returned with the appraisement; or the executor or administrator may apply to the court making the order of appraisement and have another appraiser appointed thereby. [49 v. 25, § 4.]

§ 6157. Appraisers to be sworn—certificate—view—return. The appraisers shall be sworn by some officer authorized to administer oaths, and a certificate thereof shall be inserted in or annexed to their return; and they shall afterward, upon actual view, perform the duties required of them by the order of the court, and make return of their proceedings in writing to the court. [38 v. 146, § 142.]

Form of oath.—State of Ohio——county, ss. Personally appeared before me, the undersigned, a notary public in and for said county, B. A., D. C. and F. E., who upon being duly sworn say, that they will upon actual view, honestly and impartially assign dower and appraise the real estate in the foregoing order described and perform the duties required of them by said order. [Sworn to, etc.]

Form of report of appraisers. [Title.]—In compliance with the order of court in this case, the undersigned, having been first duly sworn and having actually viewed the premises in said petition described, do set-off and assign to Q. R., the widow of deceased, for her dower estate in the real estate mentioned and described in said petition, the following described portion of the same [*here describe the tract set-off by metes and bounds*].

*We do appraise the value of the real estate described in said petition subject to said dower estate at——dollars

[Signed.]

Fees. Appraisers each
 ——days——— \$ ——
 Surveyor——— \$ ——
 Certificate and oath of appraisers, .25

[When there is more than one tract and dower is assigned in one for all, follow the above form to * and then continue.]—And we do estimate the just value of said real estate described in said petition as follows: The tract of——acres, more or less, first described in said petition, in which the above dower estate is set-off and subject to, and encumbered by said dower estate, at——dollars. The tract of——acres, more or less, secondly described in said petition, which becomes by the assignment of dower as aforesaid unencumbered, at——dollars, etc.

[Signed, etc. as above.]

[*When dower can not be set-off and rents are set-off in its place.*] [*Title.*]-In compliance with the order of the court in this case, the undersigned having been first duly sworn and having actually viewed the premises in said petition, do find that said premises are entire, and that no division thereof can be made by metes and bounds, and do therefore set-off and assign to said——as and for her dower therein, the sum of——dollars yearly during her life, being one-third of the clear annual rents, issues and profits of said premises, and we do estimate the just value of said real estate subject to and encumbered by the payment of said dower at——dollars.

[*When homestead is set-off.*]-And we do set-off and assign unto Q. R., widow, and——minor children [*or either as the case may be*] of C. D., deceased, as a homestead, the following described parcel of the real estate in the petition described, estimated to be of the value of five hundred dollars to-wit [*here describe the homestead.*]

§ 6158. **Compensation of appraisers.** The appraisers shall each receive one dollar per day, for services performed by them in the county in which they reside, and two dollars per day for services performed without such county. [38 v. 146, § 143.]

§ 6159. **Notice of sale.** The executor or administrator shall, if the sale is to be public, give notice of the time and place of sale, by advertising the same, at least four weeks successively, in some newspaper printed in the county where the lands are situate; or if no newspaper be printed therein, by advertisements posted up in at least five public places in the county, four weeks before the day of sale. [38 v. 146, § 144.]

Form of notice of sale.-In pursuance of an order of the probate court of —— county, Ohio, I will offer for sale at public auction, on the —— day of —— 188—— at —— o'clock, P. M. at the door of the court house in the city of —— [*or naming any other place where the court have ordered the sale, § 6161*] the following described real estate situated in the county of —— and State of Ohio, to-wit: [*here describe the property.*] Appraised at —— dollars. Terms of sale: [*here state how the payments are to be made, as*] one-third in hand, one-third in one year and one-third in two years from the day of sale, with interest. The payments to be secured by a mortgage upon the premises sold.

A. B., Administrator of the estate, [*or executor of the last will and testament*] of C. D., deceased.

§ 6160. **For what amount the lands may be sold. New appraisement or order to sell at fixed price.** The lands, if improved, shall not be sold for less than two-thirds of the appraised value; and if not improved, for not less than one-half the appraised value; but after

being twice offered for sale, the court may direct the amount for which they shall be sold, or may set aside the appraisement and order a new one. [38 v. 146, § 145.]

See form, § 6162.

§ 6161. **When sale to be public, when private.** The sale shall be made at public vendue, at the door of the court house in the county in which the order of sale shall have been made, or at such other place as the court may direct: provided, however, that if it is made to appear to the court that it will be more for the interest of said estate to sell such real estate at private sale, the court may authorize said petitioner to sell the same, either in whole or in part, for cash in hand, or upon deferred payments, not exceeding two years, with interest; and in no case shall such real estate be sold at private sale for less than the appraised value thereof. [68 v. 20, § 146.]

Order for public sale. [Title.]—This cause coming on this day further to be heard, and it appearing to the court that the appraisement —heretofore ordered has been made and reported to this court, and the court having carefully examined the same, finds that said appraisement——has been made in all respects in accordance with law and the order of this court, the same is now here approved and confirmed. And it appearing to the court that the plaintiff above named has given bond in sufficient amount with approved sureties conditioned according to law:* It is now ordered that the said X. Y., as such administrator, proceed to advertise for sale on the premises [or at the door of the court house, etc.] said real estate for four consecutive weeks in a newspaper of general circulation in said county, and he is further ordered to sell the same at not less than two-thirds of the appraised value thereof on the following terms, to-wit: One-third cash in hand and the balance in one and two years from day of sale, deferred payments to be secured by mortgage on the premises sold and to bear interest. And said plaintiff is ordered to make return to this court immediately after such sale.

*Order to sell at private sale. [Follow above form to * and continue.]* And it further appearing to the court that it would be to the interest of said estate to sell the real estate described in the petition at private sale, it is now ordered that said X. Y., as such administrator, proceed to sell said real estate at private sale at not less than the appraised value thereof on the following terms to-wit: [and continue as above.]

Notes.—Appraisers can not purchase at such sale, 8 O. 551; 14 O. 228; 14 O. S. 80, see § 5404; nor executors nor administrators, 6 O. S. 189; 8 O. S. 491; see 27 O. S. 159; 24 O. S. 572; 32 O. S. 29;

45 O. S.; 19 Bull 185. Where an infant purchases land at an administrator's sale for the administrator and immediately conveys to the latter, he can not disaffirm such sale on coming of age as though the land belonged to him, 3 O. S. 494. Tract of land ordered sold entire may be sold in parcels at discretion of executor or administrator, but he is responsible for the exercise of such discretion, 9 O. 19; and it will not affect the title of the purchaser if the whole tract was ordered sold and sale made of only a part, 7 O. (pt. 1) 198.

§ 6162. **Return. Confirmation. Order for deed.** The executor or administrator shall make return of his proceedings, under the order of sale; and the court after having carefully examined such return, and being satisfied that the sale has in all respects been legally made, shall confirm the sale, and order the executor or administrator to make a deed to the purchaser; and may, in the order, require that before the delivery of such deed the deferred installments of the purchase money shall be secured by mortgage. [38 v. 147, § 146.]

Form of report of sale.—Probate court of _____ county, Ohio. A. B., as administrator of the estate [or executor of the last will and testament] of C. D., deceased, *vs.* E. F. *et al.* In pursuance of the order of the court in this case, I gave notice of sale by publication in the _____ a _____ newspaper of general circulation in said county of _____ for at least four successive weeks prior to the _____ day of _____ 188____ and on that day, at _____ o'clock forenoon, upon the premises in accordance with said notice, I offered the real estate in the petition described for sale, subject to the dower estate of G. H., therein, * when I. J. bid to pay for the same the sum of _____ dollars, and his bid being the highest and best that was offered and more than two-thirds of the appraised value of said premises, I then and there sold the same to him, subject to said dower estate for that sum. Terms of sale: one-third of the purchase money to be paid in hand, one-third in one year and one-third in two years from the day of sale, with interest, the payments to be secured by mortgage upon the premises sold.

A. B., Administrator [or executor] of C. D., deceased.
_____ 188____

Report when no sale is effected. [Follow preceding form to * and continue.] And no bid being offered, said premises were not sold. I, thereupon gave notice of sale by publication in said newspaper for at least four successive weeks prior to the _____ day of _____ 188____ and on that day at _____ o'clock, _____ noon upon the premises in accordance with said notice, I offered said premises again for sale and no bid being offered, said premises were not sold.

Form of report of private sale. [Title.]—Pursuant to the foregoing, order I offered the real estate described in the petition for sale at private sale, and X. Y. having bid to pay for said real estate the sum of _____ dollars, and that sum being _____, the appraised value thereof and the highest bid offered,

I sold the same to the said X. Y. for the sum of ——— dollars. Terms of sale: one-third of the purchase money to be paid in hand, one-third in one year and one-third in two years from the day of sale, with interest, the payments to be secured by mortgage upon the premises sold. And upon being duly sworn, I depose and say that said private sale was made after diligent endeavor to obtain the best price for said property, and that the sale so reported is the highest price that I could get for said property.

Sworn to before me and subscribed in my presence this ——— day of ———, 188—, ———, Probate Judge.

By ———, Deputy Clerk.

Order of re-appraisement. [Title.]—This day this cause came on for hearing upon the application of A. B., administrator of the estate of C. D., deceased, plaintiff herein to set aside and vacate the former appraisement heretofore made under a prior order of this court, which application was submitted to the court and the court being fully advised in the premises, does find that the real estate so appraised and described in the petition for sale in this case has been twice offered for sale at public auction under said former appraisement and orders of this court and not sold for want of bidders, and that a new appraisement of said real estate should be made. It is therefore ordered and considered by the court that B. A., D. C. and F. E., three judicious and disinterested men, free-holders of this county, after being first duly sworn and upon actual view of the premises in said petition described appraise the same at its fair cash value and return their appraisement to this court for confirmation.

Order of confirmation, etc. [Title.]—This cause coming on to be heard on the return of the administrator aforesaid of his proceedings and sale under the order of this court, and on his motion to confirm the same and distribute the proceeds, was submitted to the court, and upon consideration thereof, the court, after having carefully examined said return and being satisfied that such sale has been in all respects legally made, does hereby approve and confirm the same and order that said administrator make to the purchaser, X. Y., a proper deed for the premises so sold. And the court coming now to distribute the proceeds of such sale, order that said administrator pay: *First*, the costs of this action including a counsel fee of ——— dollars to ———. *Second*, etc.

Form of deed.—Know all men by these presents, that I, A. B., as executor of the last will and testament [or administrator of the estate] of C. D., late of ———, deceased, by virtue of an order of the probate court of ———, county, Ohio, made on the ——— day of ———, in the year eighteen hundred and eighty-nine, duly authorizing me by virtue of the proceedings, etc., then and theretofore had by and in said court to sell the real estate of the said C. D., deceased, hereinafter described; and in pursuance of a sale duly made and reported to and confirmed by said court on the ——— day of ———, in the year eighteen hundred and eighty-nine; and in consideration of the sum of ——— dollars to me paid or secured to be paid by X. Y., the purchaser at said sale of the said real estate hereinafter described, the receipt whereof I do hereby acknowledge, do hereby grant, bargain, sell and convey unto the said X. Y., his heirs and assigns forever, by virtue and in pursuance of the order of this

court, a certain tract of land situated in ———, and described as follows: [*here describe the real estate.*] To have and to hold the same with the privileges and appurtenances thereof unto the said X. Y., and unto his heirs and assigns forever [*subject to dower as ordered.*] In testimony whereof, I, as executor of the last will and testament [*or administrator of the estate*] of C. D., deceased, have set my hand this ——— day of ———, 1889.

A. B., as executor, etc.

Executed in presence of

State of Ohio, ——— county, ss. On this ——— day of ———, 1889, before me, the undersigned, personally came the above named A. B., the executor of the last will and testament [*or administrator of the estate*] of C. D., deceased, the grantor in the foregoing deed, and as such executor [*or administrator*] acknowledged the signing thereof to be his voluntary act and deed for the purposes therein specified. A. B.

Witness my hand and seal this ——— day of ———, 188—,

Notary Public in and for ——— county, Ohio.

Notes.—Where an administrator executed a deed to the purchaser, to be delivered upon his complying with the terms of the sale, and before any part of the purchase money was paid, obtained a deed to himself from the purchaser on consideration of the assumption of the latter's obligation to pay for the lands the sum bid, and release him from such payment, such transaction was held void, 19 Bull 185; 45 O. S. . . A beneficiary of the estate interested in a proper distribution of the proceeds of the lands, who is present in the probate court during a settlement of the administrator's account, in which he charges himself with the purchase price of the lands, is not thereby estopped to demand that the deeds to and from the purchaser be set aside in order to obtain a re-sale of the land—the administrator refusing to make such sale and claiming the land as his own, *Id.* The sale having been made in August, 1878, and such settlement by partial account in December, 1881, the beneficiary is not estopped by lapse of time or acquiescence to compel re-sale. The court of common pleas is the proper tribunal to which to apply for an order setting aside the deeds to and from the purchaser for the purpose of obtaining a re-sale, *Id.*

§ 6163. Deed evidence of validity of sale. The deed of the executor or administrator, made in pursuance of the order of the court, shall be received in all courts as *prima facie* evidence that the executor or administrator in all respects observed the directions and complied with the requisitions of the law, and shall vest the title in the purchaser, in like manner as if conveyed by the deceased in his life time. [38 v. 146, § 148.]

Personal covenants of the administrator do not bind the estate, 12 O. S. 526; nor do his fraudulent representations as to title without warranty, 12 O. S. 530; and such representations are no defense to an action for the purchase money, 14 O. S. 276. The purchaser takes the land clear of liens, 7 O. (pt. 1) 21; 42 O. S. 53, when the sale is regular and lien-holders have been

made parties, 19 O. S. 472, and his title is not divested by a subsequent reversal of the order of sale, 3 O. S. 389. Deed may be made to assignee of purchaser, 7 O. (pt. 1) 198. Words of perpetuity, if omitted, may be supplied in equity, 7 O. (pt. 2) 165.

§ 6164. Dower specially assigned to be a charge on the land. If the appraisers shall have assigned dower specially of the rents and profits, and the purchaser takes by the deed of the executor or administrator the lands upon which such dower has been assigned, the court shall make such orders as will secure to the widow a charge on such lands for the dower so assigned. [38 v. 146, § 149.]

§ 6165. How money arising from sale of land to be applied. The money arising from the sale of real estate shall be applied in the following order:

First—To discharge the costs and expenses of the sale, and the *per centum* and charges of the executor or administrator thereon, for his administration of the same.

Second—To the payment of mortgages and judgments against the deceased, according to their respective priorities of lien, so far as the same operate as a lien on the estate of the deceased, at the time of his death; which shall be apportioned and determined by the court, on reference to a master or otherwise.

Third—To the discharge of claims and debts, in the order mentioned in this title. [38 v. 146, § 150.]

The executor or administrator is entitled to compensation and charges for making the sale, *to be first paid* before applying the proceeds to mortgage or other liens, 42 O. S. 53. Such compensation is to be computed by the *per centum* authorized by § 6188, on the money arising from such sale to be administered, *Id.* Purchasers of land at administrator's sale were held to take the same discharged of liens, and the holders of liens should look to the administrator and his sureties for the faithful application of the purchase money, 7 O. (pt. 1) 21. Proceeds of land directed by will to be sold are treated in equity as personal estate, 3 O. S. 369; 14 O. 140, 368. Individual liability of executor under will selling mortgaged premises without paying off mortgage, 40 O. S. 528.

§ 6166. Petition for sale of equitable interest. When a petition is filed for the sale of an equitable estate, or any equitable interest, which the deceased held in any lands, the executor or administrator shall set forth in the petition the nature of such equitable estate or interest, making all necessary parties, includ-

ing the persons holding the legal title thereto and those who are entitled to the purchase money therefor; and the court may, in such case, notwithstanding the preceding provisions of this title, make such order for the appraisement and sale of such equitable estate, for the indemnity of the estate of the deceased against the claim for such purchase money, and for the adjustment of the dower of the widow of the deceased, in such equitable estate, by estimating and directing to be paid to her the value of a life annuity in one-third of such equitable estate or otherwise, as it may deem just and right, between all parties in interest. [38 v. 146, ‡ 151.]

Value of annuity, according to Carlisle tables of mortality:
The value of a widow's dower is found by computing the interest for one year at 6 % on one-third the value of the entire property and multiplying the amount by the amount set opposite the widow's age. If the widow is aged 40 and the entire estate is sold for \$15,000, the value of her dower will be the interest on one-third of that sum for one year, \$300, multiplied by 12.002 (the amount opposite the widow's age), or \$3,600.60.

AGE.	6%	AGE	6%	AGE.	6%	AGE.	6%
1	12.079	26	13.369	51	10.422	76	4.579
2	12.926	27	13.276	52	10.208	77	4.410
3	13.653	28	13.183	53	9.987	78	4.238
4	14.043	29	13.096	54	9.761	79	4.040
5	14.326	30	13.020	55	9.524	80	3.858
6	14.460	31	12.942	56	9.279	81	3.656
7	14.519	32	12.860	57	9.027	82	3.474
8	14.527	33	12.771	58	8.772	83	3.286
9	14.500	34	12.675	59	8.529	84	3.102
10	14.449	35	12.573	60	8.304	85	2.909
11	14.385	36	12.465	61	8.108	86	2.739
12	14.322	37	12.355	62	7.913	87	2.599
13	14.257	38	12.239	63	7.714	88	2.515
14	14.191	39	12.120	64	7.502	89	2.417
15	14.126	40	12.002	65	7.281	90	2.286
16	14.067	41	11.887	66	7.049	91	2.248
17	14.011	42	11.779	67	6.803	92	2.337
18	13.956	43	11.668	68	6.546	93	2.440
19	13.897	44	11.551	69	6.277	94	2.492
20	13.835	45	11.428	70	5.997	95	2.522
21	13.769	46	11.296	71	5.704	96	2.486
22	13.697	47	11.154	72	5.424	97	2.368
23	13.621	48	10.998	73	5.170	98	2.227
24	13.541	49	10.828	74	4.944	99	2.004
25	13.456	50	10.631	75	4.760	100	1.596

Notes.—A conveyance in trust with a proviso for re-conveyance is an equitable estate which may be sold under this section, 12 O. S. 49. A perfect equity in lands held by an intestate passes to the heirs and may be sold by the personal representative for the payment of the debts of the estate, 9 O. 145.

§ 6167. When sale is authorized by will no order of sale is required. If any executor or administrator, duly qualified, is authorized by will or devise, to sell real estate, no order shall be required from the court to authorize him to act in pursuance of the power vested in him by such will [38 v. 146, § 153.]

See § 5980 n; 11 Bull 145, 177; 12 Bull 24; 17 Bull 820. Power to sell does not authorize an exchange or barter of lands, but a sale for money only, 1 O. 232; 2 C. C. R. 153. See 16 O. S. 236. Discretionary power to sell can not be delegated, 37 O. S. 282; see 19 Bull 198. Executor under power to sell can not enter into agreement with purchaser to sell land for less than one-third the purchase price previously agreed upon, 2 C. C. R. 359.

§ 6168. Foreign executor or administrator may be authorized to sell real estate. When an executor or administrator shall be appointed in any other state, territory or foreign country, on the estate of any person dying out of this state, and no executor or administrator thereon shall be appointed in this state, the foreign executor or administrator may file an authenticated copy of his appointment in the probate court of any county in which there may be any real estate of the deceased, together with an authenticated copy of the will, if there be one; after which he may be authorized, under an order of the court, to sell real estate for the payment of debts or legacies and charges of administration, in the same manner and upon the same terms and conditions as are prescribed in the case of an executor or administrator appointed in this state, excepting in the particulars in which a different provision is hereinafter made. [38 v. 146, § 154.]

§ 6169. Foreign executor or administrator to give bond unless already bound. When it shall appear to the court granting the order of sale that such foreign executor or administrator is bound with sufficient surety or sureties in the State or country in which he was appointed, to account for the proceeds of such sale, for the payment of debts or legacies and charges

of administration, and a copy of such bond, duly authenticated, shall be filed in court, no further bond for that purpose shall be required of him here; otherwise, before making such sale he shall give bond, with two or more sufficient sureties, to the State of Ohio, with condition to account for and dispose of the said proceeds for the payment of the debts or legacies of the deceased and the charges of administration, according to the laws of the State or country in which he was appointed. [38 v. 146, § 155.]

§ 6170. Foreign executor, etc., to give further bond to account for surplus when he sells more than is necessary to pay debts, etc. When such foreign executor or administrator is authorized by order of the court to sell more than is necessary for the payment of debts, legacies and charges of administration, as hereinbefore provided, he shall, before making the sale, give bond, with two or more sufficient sureties to the state of Ohio, with condition to account, before the court, for all the proceeds of the sale that shall remain after payment of said debts, legacies and charges, and to dispose of the same according to law. [38 v. 146, § 156.]

See form under § 6150.

§ 6171. Surplus of proceeds of sale to be considered as real estate. In all cases of a sale by an executor or administrator of part or the whole of the real estate of the deceased, under an order of court, whether such executor or administrator shall have been appointed in this state or elsewhere, the surplus of the proceeds of the sale remaining on the final settlement of the account, shall be considered as real estate, and shall be disposed of accordingly. [38 v. 146, § 157.]

And the widow of the intestate is not entitled to any part thereof in her capacity as one of the distributees of the personal estate, 22 O. S. 79; but lands directed by will to be sold and converted into money, are considered in equity as personal property, 14 O. 140; 368; 3 O. S. 369. Where the real estate of an intestate, who had no issue at his decease, is sold by an administrator for the payment of debts, and before final distribution of a balance remaining after payment of the same, and the satisfaction of the widow's dower, his posthumous child dies, the surplus money belonging to such child is subject to the law of distribution as personal property. 11 O. S. 290.

§ 6172. **Sale may be ordered for the payment of legacies.** When a testator shall have given any legacy by will that is effectual to pass or charge real estate, and his personal estate shall be insufficient to pay such legacy, together with his debts, the allowance to the widow and children, and the costs of administration, the executor or administrator, with the will annexed, may be ordered to sell his real estate for that purpose, in the same manner and upon the same terms and conditions as are prescribed herein for the payment of debts. [38 v. 146, § 158.]

See § 5967 *n charges*.

§ 6173. **Certificate from Probate Court when proceedings for partition commenced and deficiency of assets found.** If at any time after the institution of proceedings for the partition of the lands of any deceased person, it is found that the assets in the hands of the executor or administrator of such deceased, are probably insufficient to pay the indebtedness of the estate and expenses of administration, the executor or administrator shall make a written statement to the probate court of the said assets and indebtedness and expenses, and the court shall forthwith ascertain the amount necessary to pay the said indebtedness and expenses in addition to the assets, and give a certificate thereof to the executor or administrator. [74 v. 167, § 1.]

§ 6174. **Court shall order so much of proceeds to be paid over to him, provided, etc.** The executor or administrator shall thereupon present said certificate to the court in which the proceedings for partition are, or have been pending, and on his motion said court shall order the amount named in said certificate as necessary, to be paid over to the executor or administrator out of the proceeds of the sale of the premises, if the same shall be thereafter sold, or have already been sold; provided, that nothing herein contained shall be so construed as to prohibit any executor or administrator from proceeding to sell land belonging to such estate to pay any debts, when the same has been sold on partition or otherwise, or the proceeds of such sale fully distributed. [74 v. 167, § 2.]

Sale after partition and conveyance by heirs. 17 O. S. 248.

THE ACCOUNT AND COMPENSATION OF AN EXECUTOR OR ADMINISTRATOR: AND DISTRIBUTION IN CERTAIN CASES.

§ 6175. **Executor or administrator to render an account, etc.** Every executor or administrator shall, within eighteen months after his appointment, render his account of his administration upon oath, and he shall in like manner render such further accounts of his administration. and every twelve months thereafter; and also at such other times as may be required by the court until the estate shall be wholly settled; and he may be examined upon oath on any matter relating to his accounts and the payments therein mentioned, and also touching any property or effects of the deceased which have come to his hands. [81 v. 138; 71 v. 77, § 161.]

See § 6175 a.

§ 6175 a. **When executor or administrator shall render final account.** Where an executor or administrator has died or shall by reason of insanity or other incompetency, as provided by law, be placed under guardianship before the estate is fully administered, it shall be the duty of the executor, administrator or guardian of such deceased or incompetent executor or administrator to render a final account of such decedent's or ward's administration within six months after his appointment. [81 v. 138; 71 v. 77, § 161.]

The settlement of an account of an executor or administrator by the probate court, is conclusive as against parties with actual notice of the settlement, of all matters specified therein, and as to such matters the party can not be required to account a second time, unless the same be impeached for fraud or manifest error; but such account is not final so as to bar further inquiry in regard to other assets in the hands of the executor or administrator not accounted for or passed on, 25 O. S. 374; and for such matters the court may at any time within the limits of the statute compel a further settlement by the process indicated, *Id.* But upon the settlement of the final account of an administrator, it is not the duty of the probate judge to provide for the payment of claims against the estate which no creditor is asserting, 32 O. S. 532; nor is it within the jurisdiction of the probate court upon such final settlement, to determine the state of accounts between the administrator and the several distributees of the estate to whom any balance found in his hands may be payable. The court can only order distribution of such balance according to law, leaving the state of accounts between the parties to be inquired into when such order of distribution is sought to be enforced by the several distribu-

tees, *Id.* Any creditor can compel a settlement, 6 O. 108; but a creditor can not at his option transfer settlement to court of chancery, 1 O. S. 293.

A settlement of the account of an executor who has been removed, does not bar a subsequent suit by him, against his successor, upon a demand existing in the life-time of his testator, 2 C. C. R. 7.

§ 6176. Account rendered by two may be allowed upon oath of one. When any account is rendered by two or more joint executors or administrators, the court may, in its discretion, allow the account upon the oath of any one of them. [38 v. 146, § 162.]

§ 6177. Time allowed to collect assets not to operate as allowance of further time to file account. The time allowed by the court to collect the assets of the estate, shall not operate as an allowance of further time to file the accounts mentioned in the preceding sections. [38 v. 146, § 163.]

§ 6178. How compelled to render account. If any executor or administrator shall fail to render his accounts as hereinbefore directed, he may be compelled to do so, as in case of failing to file an inventory, and the same proceedings may be had to attach and remove him and to appoint a successor. [81 v. 138; 38 v. 146, § 164.]

The power to proceed against an executor or administrator by citation or attachment in such cases, becomes dormant after sufficient time has elapsed to bar suit on administration bond, 5 O. S. 122. See § 6047.

§ 6179. With what executor or administrator shall be charged. Every executor or administrator shall be chargeable with the amount of the sale-bill, as hereinbefore provided, and also, with all goods, chattels, rights, and credits of the deceased which shall come to his hands, and which are by law to be administered, although they should not be included in the inventory or sale-bill; also, with all the proceeds of real estate, sold for the payment of debts or legacies, and with all the interest, profit, and income that shall in any way come to his hands from the personal estate of the deceased. [38 v. 146, § 167.]

An administrator or executor is not chargeable with interest on money which may come into his hands as the representative of a deceased person, unless he employ it in his own business,

derive some benefit from the farming it out, or delay to an unreasonable and unnecessary degree in making the settlement of his accounts in the probate court, 7 O. S. 22.

§ 6180. Increase or decrease of estate not to affect executor or administrator. No profits shall be made by executors or administrators, by the increase, nor shall they sustain any loss by the decrease or destruction, without their fault, of any part of the estate. [38 v. 146, § 168.]

See 20 O. S. 442; 1 C. S. C. R. 327.

§ 6181. Executor or administrator not responsible for bad debts. No executor or administrator shall be accountable for any debts inventoried as due to the deceased, if it shall appear to the court that they remain uncollected without his fault. [38 v. 146, § 169.]

§ 6182. How chargeable with property consumed by him. If any executor or administrator shall neglect to sell any portion of the personal property which he is bound by law to sell, and retains, consumes, or disposes of the same, for his own benefit, he shall be charged therewith at double the value affixed thereto by the appraisers. [38 v. 146, § 170.]

§ 6183. Vouchers to be produced for all debts paid. In rendering such account, every executor or administrator shall produce vouchers for all debts and legacies paid, and for all funeral charges and just and necessary expenses, which vouchers shall be filed with the account, and they, together with the account, shall be deposited and remain in the probate court. [38 v. 146, § 171.]

§ 6184 What items may be allowed without vouchers. On the settlement of an account of an executor or administrator, he may be allowed any item of expenditure, not exceeding ten dollars, for which no voucher is produced, if such item be supported by his own oath positively to the fact of payment, specifying when and to whom such payment was made, and if such oath be uncontradicted; but such allowance shall not, in the whole, exceed two hundred dollars, for payments in behalf of any one estate. [38 v. 146, § 172.]

§ 6185. The court may allow for a tombstone. The court may also, on settlement, allow, as a credit, to the executor or administrator, any just and reasonable amount expended by him for a tombstone or monument for the deceased; but it shall not be incumbent on any executor or administrator to procure a tombstone or monument. [64 v. 35, § 1.]

See 10 Bull 335, 39 O. S. 579, 581. An administrator has no power to bind the estate of his intestate by a negotiable note given by him as administrator. *Id.*

§ 6186. Court may refer account to special commissioner. The court may, if it shall deem it expedient and proper, refer the account and the exceptions thereto, if any, to a special commissioner, appointed by the court for that purpose. [38 v. 146, § 173.]

§ 6187. When and how account may be opened after settlement. When an account is settled in the absence of any person adversely interested, and without actual notice to him, the account may be opened, on his filing exceptions to the account, at any time within eight months thereafter; and upon every settlement of an account by an executor or administrator, all his former accounts may be so far opened as to correct any mistake or error therein; excepting that any matter of dispute between two parties, which had been previously heard, and determined by the court, shall not be again brought in question, by either or the same parties, without leave of the court. If upon hearing and settlement of such account, a balance remains in the hands of the executor or administrator due the estate, the court may in its discretion order distribution to be made by such executor or administrator according to law. [81 v. 138; 38 v. 146, § 174.]

Former account may be opened up to correct errors, 38 O. S. 480; see 1 C. C. R. 504; but matters excepted to and decided, can not be opened up, 33 O. S. 481; 38 *Id.* 480.

The settlement of an account is conclusive only as to matters specified therein, 25 O. S. 874. Such settlement and account binds no right except where made in conformity to law, 7 O. (pt. 1) 21. Settlement with heirs is final except as to minors, 27 O. S. 159. Personal representatives must account for new assets, 29 O. S. 569; 38 *Id.* 480.

An account containing items of credit to an administrator for his statutory commission and for extra services, and for an amount paid by him for attorneys' fees in the settlement of the estate and which account current was duly allowed and confirmed by the probate court, can not on the filing of a second account more than one year thereafter be re-opened for hearing, and such items be disallowed by the court, on exceptions filed thereto, when it is not claimed or found that there was any error or mistake therein or in their allowance, 1 C. C. R. 504.

§ 6188. Compensation allowed executors or administrators—further allowance—effect of compensation provided by will. Executors and administrators may be allowed the following commissions upon the amount of the personal estate collected and accounted for by them, and of the proceeds of the real estate sold under an order of court for the payment of debts, or under directions of the will which shall be received in full compensation for all their ordinary services; that is to say:

For the first thousand dollars, at the rate of six *per centum*;

For all above that sum, and not exceeding five thousand dollars, at the rate of four *per centum*; and

For all above five thousand dollars, at the rate of two *per centum*.

And in all cases, such further allowance shall be made as the court shall consider just and reasonable for actual and necessary expenses, and for any extraordinary services, not required of an executor or administrator, in the common course of his duty: provided, however, that when provision shall be made by the will of the deceased, for compensation to any executor, the same shall be deemed a full satisfaction for his services, in lieu of his aforesaid commissions or his share thereof, unless he shall, by an instrument filed in the court, renounce all claim to such compensation given by the will. [38 v. 146, § 175.]

Of executor, etc. of surviving partner, 38 O. S. 357; when mortgagee a purchaser, 42 O. S. 53. Extra compensation for services as attorney, 7 Rec. 326; for surveying and subdividing land, *Id.* The payment of a debt of a decedent by the conveyance of mortgaged real estate in satisfaction of the same is not such a disbursement as will entitle the personal representative to the percentage designated by law, 27 O. S. 159, 183; but a court will refuse to interfere to disallow such charge after long acquiescence and a final settlement of the estate, *Id.* Not entitled

to per cent. on legacies unless extra work done. 8 O. S. 300. As to costs paid W. 40, 414. Costs of contest of will not allowed, 7 O. S. 143; *contra* 18 Bull 198, see 81 Ky. 328; not allowed cost of proceedings to establish forged will, 100 Pa. St. 197. An executor who refused to obey the order of the court to file an account, although served with five citations, should not receive an allowance for extra services, 2 C. C. R. 103; but even if there be unfaithful administration of the estate, it will not deprive an executor or administrator of a right to compensation for his services, so far as they have been beneficial to the persons interested in the estate, 1 C. C. R. 504. Generally as to compensation, 3 Am. Rep. note p. 583. Double commissions as executor and trustee against policy of the law. 95 N. Y. 154; 4 Am. Prob. Rep. note p. 335; unless will contemplates severance of their duties, *Id.* p. 570; 4 East Rep.; 15 Bull 195. Administrator is entitled to statutory commissions though he may have failed to charge himself with all the assets received by him or has asked for credits for sums not paid by him, 1 C. C. R. 504.

If a mortgagee whose lien is fixed by the court, becomes the purchaser at an executor's or administrator's sale, the executor or administrator is not entitled to a *per centum* compensation on that part of the purchase money applicable to the satisfaction of his mortgage, 42 O. S. 53. § 6165 and 6188 should be construed together in determining the *per centum* compensation for the sale of real estate and it is to be computed on the aggregate amount arising from both real and personal estate, as graduated by § 6188, and not each separately. Hence it is error where there are personal assets collected, to graduate the compensation on the proceeds of the real estate without regard to the amount of the personal estate. In graduating the *per centum* compensation the higher rate prescribed by § 6188 should be first applied to the personal estate, *Id.*

§ 6189. **Executor or administrator may distribute certain assets in kind.** An executor or administrator who has paid all the debts of an estate, and has in his possession notes, bonds, stocks, claims, or other rights in action belonging to the estate, may, with the approval of the probate court, entered on its journal, (and with the assent and agreement of the persons entitled to the proceeds of such assets as distributees, including executors, trustees and guardians) distribute and pay over the same in kind, to those of such distributees as will receive the same; and any such executor or administrator, when the debts are all paid, except claims in suit and contested, or liabilities not due and payable, or both, may provide for the payment of such claims and liabilities, by setting apart to the satisfaction of the probate court enough of the assets for that purpose, and having done so, he may, with the approval, assent, and agreement, aforesaid, dis-

tribute and pay over in cash, or in kind, all or any part of the assets in his hands, and not set apart aforesaid, to such of said distributees, including executors, trustees, and guardians, as may be willing to receive the same. Such executors, trustees, and guardians, shall be liable to return such assets, or the proceeds thereof, should the same be necessary to pay the said claims or liabilities, and each of the other distributees, shall give an indemnifying bond to the executor or administrator, to the satisfaction of the probate court for the same purpose. A distribution, in kind, in either case, shall have the same force and effect as the distribution of the proceeds of such assets. [77 v. 77.]

§ 6190. **How executor or administrator may obtain his final discharge.** When an executor or administrator has paid or delivered over to the persons entitled thereto, the money or other property in his hands as required by the order of distribution, or otherwise, he may perpetuate the evidence of such payment by presenting to the court, within one year after such order was made, an account of such payments, or the delivery over of such property; which being proved to the satisfaction of the court, and verified by the oath of the party, shall be allowed as his final discharge, and ordered by the court to be recorded; and such discharge shall forever exonerate the party and his sureties from all liability under such order, unless his account shall be impeached for fraud or manifest error. [38 v. 146, § 176.]

After the executor has made his final settlement he may or may not, at his election make returns to the court of the distribution of the balance remaining in his hands at such settlement. If he does return his vouchers received on distribution, and has them passed upon by the court, the only effect of this action is to place upon record the receipts in the hands of the executor and administrator, and make them final as to those who have signed them as to so much of their distributive share as the vouchers may represent, and although the receipts may cover the whole property, those who are entitled to a distributive share, and have not received it are not precluded from enforcing their claims, 20 O. 810; but when an estate has been fully settled and all the moneys in the hands of an administrator have been paid over in pursuance of an order of distribution of court, should a will then be discovered and proved, the

executor can not compel the former administrator to account for the money or property by him received and paid over, 18 O. 268.

§ 6191. **How unclaimed money to be invested.** If any sum of money directed by a decree or order of the court to be distributed to heirs, next of kin, or legatees, shall remain for the space of six months unclaimed, the executor or administrator who was ordered to pay over the same, may, by order of the court, invest the same in stocks, or loan the same on bond or mortgage, as the court shall direct, to accumulate for the benefit of the persons entitled thereto; and such investment shall be made in the name of the judge of the court for the time being, and shall be subject to the order of the judge and his successors in office, as hereinafter provided; and the person making such investment shall file in the court a memorandum thereof, with the original certificates, or other evidence of title thereto, which shall be allowed as a sufficient voucher for such payment under the said order or decree; provided, that if the amount can not be so invested, the same, under the order of the court, may be turned into the county treasury and credited to the general fund, and the receipt of the county treasurer taken therefor and filed as a sufficient voucher. [81 v. 139; 38 v. 146, § 177.]

§ 6192. **When and how such money paid to owner.** When the person entitled to the money invested, or turned into the treasury, shall satisfy the court of his right to receive the same, the court shall order it to be paid over and transferred to him, and in case it shall have been turned into the treasury, he shall receive a warrant therefor from the auditor, upon the certificate of the judge. [81 v. 139; 38 v. 146, § 178.]

§ 6193. **Judge responsible for safe keeping of certificates, etc.** The Judge with whom such certificates or evidences of title are deposited, for the time being, and each succeeding judge to whom they shall come, and his sureties, shall be responsible for their safe keeping and application, as provided in the two preceding sections of this chapter. [38 v. 147, § 179.]

§ 6194. Amount of personal estate to which widow is entitled. Repealed March 19, 1887. 84 v. 132, 136.

§ 6195. How payment of distribution enforced—petition therefor. After thirty days from the time of the settlement of the account of an executor, administrator, or guardian shall have been made or shall hereafter be made by the probate court, and an order of distribution made thereon, if such executor, administrator or guardian shall neglect or refuse to pay to any person interested in said order of distribution, as creditor, legatee, widow, heir, or other distributee, or otherwise, when demanded, his or her share of the estate or property ordered to be distributed by such probate court, it shall be lawful for any person interested, as aforesaid, to file a petition in the probate court against the executor, administrator, or guardian making such settlement of his or her account, as aforesaid, briefly setting forth in the petition the amount and nature of the claim of the party filing such petition, whereupon the probate judge shall forthwith issue a citation against such executor, administrator, or guardian, setting forth the filing of the petition, the amount claimed by the petitioner, and commanding such executor, administrator, or guardian, to appear before said probate court on the return day thereof, to answer said petition, and show cause, if any, why judgment should not be rendered and execution awarded against him or her for the amount claimed by such petitioner, and found to be due upon such settlement and order of distribution, which citation shall be made returnable not less than twenty nor more than forty days from the date thereof, which shall be served and returned by the sheriff or other proper officer, as in the case of a summons, and may issue to any county in the state. [78 v. 26; 54 v. 202, § 1.]

Form of petition to compel distribution. [Title.]—A. B., the plaintiff, says that as one of the creditors of the estate of X. Y., deceased, he is entitled to — dollars, under the order of distribution made by the probate court of — county, Ohio, upon settlement of the account of C. D., as executor of the last will and testament [or administrator of the estate] of said X. Y., deceased. Plaintiff further says that although more than thirty days have elapsed since said order of distribution was made, the said C. D. has not paid to the plaintiff said sum of

— dollars, nor any part thereof, although requested so to do; but has wholly neglected and refused to pay the same. Wherefore the plaintiff asks judgment and execution against the said C. D. for said sum of — dollars, with interest thereon from the — day of —, A. D. 188—, being the day on which said money was demanded. A. B.

[*Verification.*]

Notes.—§ 6195 and 6201 do not repeal § 6210-6212, 23 O. S. 443. They furnish a complete remedy to next of kin to recover their share, if as to any portion testator died intestate, 88 O. S. 426.

§ 6196. Service, when executor or administrator non-resident. But if such executor or administrator shall reside out of this state, the court being satisfied of that fact, either before or after the return of the citation, may order such non-resident to be brought into court, by publication in some newspaper of the county in which the petition is filed, for six consecutive weeks before the time fixed for the hearing of said cause; or in case no newspaper be published in the county, then to be published in some newspaper having a general circulation in said county. [54 v. 202, § 2.]

Form of notice.—C. D., who resides in the State of —, will take notice that A. B., on the — day of —, A. D. 188—, filed his petition in the probate court in the county of —, and State of Ohio, alleging that as one of the creditors of the estate of said X. Y., deceased, he is entitled to the sum of — dollars, with interest thereon from the — day of — 188— under the order of distribution made by said court upon settlement of the account of said C. D., as executor of the last will and testament [or administrator of the estate] of X. Y., deceased, and that although more than thirty days have elapsed since said order of distribution was made and although payment has been demanded of said C. D., he has neglected and refused to pay said A. B. the amount claimed by him as aforesaid. The prayer of the petition is for judgment and execution against the said C. D. for the amount due said A. B., as aforesaid.

Said petition will be for hearing on the [at least six weeks after date of first publication] — 188— A. B.

§ 6197. Hearing and Judgment—Execution—Lien. On the return of the citation served, or the service of notice by publication, as aforesaid, the cause shall be considered ready for hearing, unless for good cause shown by either party the same shall be continued for trial and judgment, as in other cases of continuance, and if no good cause be shown, in defense of the claim of the plaintiff in such petition, it shall be lawful for such probate court to render judgment in

favor of such plaintiff, against such executor or administrator, for the amount found to be due to the petitioner, and remaining unpaid, upon the settlement and order of distribution, as aforesaid, with the interest and costs of suit, and to award execution thereon, as in other cases of judgments, which execution shall be served and returned, by the sheriff or other proper officer, in all respects as executions issued from the court of common pleas, and all judgments rendered under this section shall have like liens upon the real estate of the parties as judgments rendered in the common pleas, and governed in all respects by the same rules. [54 v. 202, § 3.]

§ 6198. Probate Court may bring in all necessary parties and determine all questions. If the amount coming to any heir, legatee, widow, or other distributee, under such order of distribution, shall be uncertain, or in dispute, depending upon the construction of any devise, bequest, conveyance, contract, or advancement, or upon any other question, the probate judge may hear and determine all such questions necessary to ascertain and fix the amount due the plaintiff in such petition, and, if necessary, to hear and determine, and settle the rights and claims of all the parties interested, as aforesaid, in such order of distribution, and for that purpose the probate court is hereby authorized to cause all the heirs, legatees, or other distributees, parties in interest, to be made parties to said petition, when the same is necessary, by amended or supplemental petition, and service of notice, as is provided in the preceding section of this chapter; and in such case to render judgment and award execution against such executor or administrator in favor of the parties, respectively, for the amounts, respectively, found due them, with the interest and costs, unless the court should be of opinion the costs should be paid out of the estate ordered to be distributed, or by the parties, in which case such order shall be made respecting the costs as shall seem equitable. [54 v. 202, § 4.]

§ 6199. Probate court shall on motion of either party send the case to the common pleas. In all cases under

the sections of this chapter relating to the enforcement of an order of distribution, the probate court before which any proceeding shall be pending shall, on motion of any of the parties to said proceeding, cause the same to be reserved and sent to the court of common pleas of that county for trial and judgment and execution, and in case of such reservation it shall be the duty of the probate judge forthwith to make out a transcript of his proceedings in the cause, so far as he has progressed in the same, which together with the petition, and all other papers in the cause, shall be forthwith filed with the clerk of the court of common pleas of the county in which the cause is commenced, and said cause shall thereafter be carried on to final judgment and execution in said court of common pleas, in all respects as though the same had been originally commenced there, as a civil action. [54 v. 202, § 5]

§ 6200. **Common pleas to have concurrent jurisdiction to enforce order of distribution.** The court of common pleas shall have concurrent original jurisdiction with the probate court, in all cases provided for in the four sections preceding the next above, and any creditor, legatee, widow, or other distributee, as aforesaid, may bring a civil action in the court of common pleas of the proper county, against such executor or administrator, for his or her share of the estate, upon such settlement and order of distribution, in the same manner as other civil actions, and proceed therein to final judgment and execution, and be governed in all respects as upon other civil actions, and to cause all persons interested in said cause, as heirs, legatees, distributees, or otherwise, to be made parties to any action aforesaid, if it shall be deemed necessary, in order to a full and complete settlement and adjustment of the rights of the parties, in the same manner as other civil actions, with full power and authority to settle and determine the rights of the parties, and render judgment and award execution thereon as in other cases. [54 v. 202, § 6.]

Suit may be brought against an administrator by a distributee, individually, as for money had and received without naming him as administrator, 2 O. 156; 20 O. 810.

§ 6201. Sureties—Their liability — May be made parties to judgment—Defense. The sureties of every such executor or administrator shall moreover be liable upon the official bond of the executor or administrator against whom any judgment may be rendered under the provisions of the preceding sections, either in the probate court or court of common pleas; and such sureties may be made parties to any such judgment by petition or action to be commenced and prosecuted in the same manner as is above provided for the commencement and prosecuting causes against executors or administrators, to final judgment and execution: provided, that in all cases in which service of process shall have been made upon such executors or administrators, by publication, as above provided, the surety shall be permitted to make the same defense as the executor or administrator could have made. [54 v. 202, § 7.]

§ 6202. Action in common pleas asking direction of court respecting estate, who may bring. Any executor, administrator, guardian, or other trustee, may maintain a civil action in the court of common pleas against the creditors, legatees, distributees, or other parties, asking the direction or judgment of the court in any matter respecting the trust, estate, or property to be administered, and the rights of the parties in interest, in the same manner, and as fully as was formerly entertained in courts of chancery; and in case any executor, administrator, guardian, or other trustee, after being requested in writing by any creditor, legatee, distributee, or other party in interest, to bring such action, fail for thirty days so to do, the creditor, legatee, distributee, or other party making such request, may institute the same. [75 v. 903, § 211; 76 v. 113, § 1.]

The action can not be maintained in cases where no trust is involved, 19 O. S. 468; see 29 O. S. 147. A trustee who is also executor, there being two claimants to a fund, may ask the direction of the court, 25 O. S. 128, 133; see 35 O. S. 503; 33 O. S. 426; 44 O. S. 530; 1 C. C. R. 320.

§ 6203. Appeals from Probate Court and from Common Pleas—Bills of exception. Appeals shall be allowed from any final order, judgment, or decree of the pro-

bate court to the court of common pleas, by any person against whom any such order, judgment, or decree may be made, or who may be affected thereby, in the same manner as is provided for appeals from the probate court to the common pleas in other cases; appeals shall also be allowed from any order or judgment of the court of common pleas, in like manner, to the circuit court, in proceedings under the sections herein relating to the enforcement of orders of distribution, by any person against whom any such judgment or order may be rendered, or who may be affected thereby, to the same extent and in the same manner as is provided for appeals from the common pleas in other cases; and bills of exceptions may be taken and allowed upon any decision of the probate court, court of common pleas, or circuit court, in such proceedings, as in other cases. [83 v. 62; 54 v. 202, § 9.]

§ 6407.

THE ADMINISTRATION BOND: SURETIES IN: SUIT ON: AND
OTHER MATTERS RELATING TO THE SAME.

§ 6204. **How sureties of executor or administrator may be released.** Any surety of an executor or administrator, or the executor or administrator of any such surety, may, at any time, make application to the proper probate court to be released from the bond of such executor or administrator, by filing his written request therefor with the judge of said court, and giving at least five days' notice, in writing, to such executor or administrator; and if such court upon the hearing is of opinion there is good reason therefor, the court shall release such surety, and the death of a surety shall always be deemed good cause; and if such executor or administrator fail to give new bond, as by such court directed, he shall be removed and his letters superseded; but such original surety shall not be released until such executor or administrator so gives bond, and such original sureties shall be liable only for the acts of such executor or administrator from the time of the execution of the original bond to the filing of the second bond; and the

costs of such proceeding shall be paid by the surety applying to be released, unless it shall appear to the court that the administrator or executor is insolvent, incompetent, or is wasting the assets of the estate. [58 v. 46, § 1.]

Liability of sureties on bond of removed executor in action by successor, 20 Bull 55, following 44 O. S. 637. Liability of sureties on new bond of executor for conversion of assets of estate prior to giving new bond, *Id.* Refusal of administrator to pay judgment against him on negotiable note, given by him as such not a breach of the conditions of his bond, and sureties not estopped in action upon it to deny validity of such judgment, 39 O. S. 579; see § 6273.

§ 6205. When new bond may be required. Whenever the sureties in any bond of an executor or administrator shall be insufficient, the court, on the petition of any person interested, and after notice to the principal in the bond may require a new bond to be given, with two or more sufficient sureties. [38 v. 146, § 196.]

§ 6206. Liability of prior sureties. When a new bond shall be required, as above provided, the sureties in the prior bond shall, nevertheless, be liable for all breaches of the condition committed before the new bond shall be approved by the court. [38 v. 146, § 198.] see § 6204 N.

§ 6207. If bond not given, may be removed from trust. If, in the cases specified in the two preceding sections, the principal shall not give such new bond, within such time as shall be ordered by the court, he shall be removed from his trust, and some other person may be appointed in his stead, as the circumstances of the case may require. [38 v. 146, § 199.]

§ 6208. When executor or administrator to give bond of indemnity to surety. If any executor or administrator shall waste, or unfaithfully administer the estate, the court granting the letters may, if it thinks fit, on the application of any surety in the administration bond, order such executor or administrator to render an account, and to execute to such surety a bond of indemnity, with surety or sureties approved by the court; and upon neglect or refusal to execute such bond of indemnity within the time ordered by the

court, it may remove him, and revoke his letters testamentary, or letters of administration, and appoint another administrator in his place. [38 v. 146, § 200.]

See § 5999 n.

§ 6209. When unfaithful administration shall be presumed. If an executor or administrator shall unreasonably delay to raise money, by collecting the debts and effects of the deceased, or by selling the real estate, if necessary, and if he can obtain an order therefor, or shall neglect to pay what he has in his hands; and if, in consequence of such delay or neglect, the estate of the deceased shall be taken in execution by any of his creditors, it shall be deemed unfaithful administration in such executor or administrator, and he shall be liable on his administration bond for all damages occasioned thereby. [38 v. 146, § 181.]

See § 6215.

§ 6210. When creditor may sue on administration bond. After a creditor is entitled by law to the payment of his debt, from the executors or administrators, and the amount of the claim has either been admitted to be just or allowed by them, or has been ascertained by judgment or award against them, or by an order of distribution, the bond given by them for the discharge of their trust, may be put in suit by such creditor, if the executors or administrators shall neglect upon demand made by such creditor, to pay such claim. [38 v. 146, § 182.]

This is a cumulative remedy, 39 O. S. 112, see § 6211 n.

§ 6211. When legatee or distributee may sue on administration bond. Such suit may also be brought by a legatee, after he shall be entitled to the payment of his legacy, and by the widow, or other distributee, to recover his or her share of the personal estate, after an order of the court, ascertaining the amount due to him or her, if the executor or administrator shall neglect to pay the same when demanded. [38 v. 146, § 183.]

Form of petition. [Title.] Plaintiff says he is one of the heirs at law and legal distributees of the estate of X. Y., deceased. That on or about the _____ day of _____ 188— the defendant was appointed the administrator of the estate of said decedent, and duly qualified and entered upon the discharge of his duties as such administrator. That before entering upon the discharge of his said duties and on the _____ day of _____ 188— he, together with the defendants, E. F. and G. H., as his sureties, executed and filed in the office of the probate court of _____ county, Ohio, their joint and several bond as required by law, in the sum of _____ dollars, of which the following is a copy. [Here copy bond.] That after the said A. B. entered upon the discharge of his said duties as administrator, a large amount of assets came to his hands to be administered, and on the _____ day of _____ 188— the said A. B. settled in said probate court his accounts of administration and there was then found by the consideration of said court the sum of _____ dollars in his hands which the said A. B. was adjudged to pay over according to law. Plaintiff as one of the heirs of the said X. Y., is entitled to receive from said administrator the one-fourth part of the sum of _____ dollars, to-wit, the sum of _____ dollars.

That afterward on the _____ day of _____ 188— the plaintiff demanded of the said A. B., the sum of _____ dollars, but the said A. B. did not and would not pay any part thereof.

Plaintiff asks judgment against the defendants for the said sum of _____ dollars with interest thereon from the _____ day of _____ 188—

[Verification.]

_____ Attorney for plaintiff.

Notes.—Under this and the preceding section the amount must be liquidated, 2 O. S. 1. Demand of payment must be averred, but leave of court is not necessary to sue. *Id.*, but a legatee or distributee can not sue within the four years allowed creditors to file their claims without an order of probate court, 25 O. S. 443. As against a demurrer to the petition it is a sufficient allegation of breach to set forth the condition of the bond alleged to have been broken and aver the non-performance of the condition, though the petition might be open to a motion to make more definite and certain, 27 O. S. 366. Where the breaches alleged in the bond of an executor or administrator consist in his failing to return an inventory, and of his wasting and converting the assets of the estate to his own use, in such case, the action should be brought for the benefit of the estate and not for the benefit of any particular creditor, legatee, or distributee, 25 O. S. 443; but in such action assigning as a sole breach of the bond unfaithful administration in this, that the administrator has neglected and failed on demand for payment of a claim, to bring lands belonging to the estate of decedent into market to raise money to pay, the plaintiff's claim against the estate, it is a valid and sufficient defense that the plaintiffs have in their possession, as surviving partners of the decedent assets of the late firm sufficient in amount to liquidate their claim, 30 O. S. 308. All suits on the official bonds of executors or administrators must be governed by the law in

force at the time the bond was given, 7 O. (pt. 1) 206; 20 O. 98, § 6210, 6212 are not repealed by § 6195 and 6201, 25 O. S. 443, § 6108 has no application to suits on administration bonds, 2 O. S. 574. Fraud in obtaining surety on executor's bond a good defense to the action, 13 Bull 554.

§ 6212. When court may authorize suit to be brought. When it shall appear to the probate court, on the representation of any person interested in the estate of any deceased testator or intestate, that the executor or administrator has failed to perform his duty, in any other particular than those above specified in the two preceding sections, the court may authorize any creditor, next of kin, legatee, or other person aggrieved by such maladministration, to bring a suit on the bond. [38 v. 146, § 184.]

Previous to such suit by a legatee it is not necessary that the probate court should find or fix the amount of the legacy or order its payment, 38 O. S. 650. That an account purporting to be a final account has been settled in the probate court is no bar to an action under this section to recover assets converted by an executor to his own use and not accounted for, *Id.* Where the breaches alleged in the bond consist of a failure to return an inventory or wasting and converting assets, etc., the action should be brought for the benefit of the estate and not for the benefit of the particular legatee or distributee, 25 O. S. 443.

§ 6213. Defense in suit on administration bond for not filing account—costs. In all actions on any bond of an administrator or executor, for a breach thereof, by not filing his final account at the time required by law, or by order of the court, the defendant may aver and give in evidence any facts tending to show that the said breach did not occur by reason of neglect or unreasonable delay of the administrator or executor to settle the estate or file said account; and if the defendant shall make good his defense, he shall recover of the plaintiff his costs; and in no case brought for such breach shall the plaintiff recover more costs than damages. [44 v. 76, § 1.]

§ 6214. When succeeding administrator, co-executor or co-administrator may sue on bond. In all cases when the powers of an executor or administrator cease by death, removal, resignation, or in any other manner or shall have heretofore so ceased, any succeeding administrator, or co-executor, or co-administrator, may maintain an action on the bond of such execu-

tor or administrator, whose powers have ceased, against any of the obligors thereof, or their legal representatives, for any breach of the conditions of the bond. [52 v. 24, § 1.]

The averment of a failure of an administrator or executor who has resigned, to pay to his successor the amount due from him on the settlement of his accounts, is a sufficient assignment of a breach of the condition of his bond, 44 O. S. 637. See generally 18 O. S. 225, 268; 2 O. S. 432. The administrator *de bonis non* can maintain the action without liquidation of the amount due, 28 O. S. 175, and without leave of court, 27 O. S. 866. Such administrator can maintain an action on the bond of a former administrator for the assets of the estate which have come into his hands and have not been accounted for; and a judgment against a former administrator on such claim is evidence against him and his sureties in an action on his administration bond, and can only be impeached by proof of fraud or mistake; and a general allegation in a petition on an administration bond that he did not settle the estate within the time required by law and refused to make settlement is good, 18 O. S. 225. When one of two or more executors or administrators has in his hands the balance remaining for distribution, an action may be maintained against him *personally* as for money had and received without joining his co-executor or co-administrator, 20 O. S. 310.

§ 6215. In what courts and how bond may be sued. An action on the bond may be brought in the court of common pleas or superior court of the county in which it was given, for the particular relief only to which the plaintiff is entitled, or it may be framed, either in the petition or in any cross-petition filed in the case with a view to a settlement of all matters for which the principal in the bond is accountable, and any heirs, devisees, legatees, widow, or next of kin, or others who may be liable on account of assets having come into their hands, or who may otherwise be proper or necessary parties, may be made defendants; and when the action is framed for that purpose and the necessary parties are before the court, the court may adjust and settle the estate in whole or in part, rendering all judgments required, and may award costs as may be deemed proper. [38 v. 146, § 185, 186, 187, 188, 189, 190, 191, 192, 193, 194.]

Probate court has no jurisdiction, 25 O. S. 443; nor justice, 31 O. S. 655.

§ 6216. In suit on bond, claim allowed to be *prima facie* evidence only of its justice—How such claim contested. When suit is brought upon the administration bond,

by a creditor whose claim has been allowed or admitted by the executor or administrator, such allowance or admission shall be *prima facie* evidence only of the validity and justice of such claim; and may, in the suit upon the administration bond, contest the same, and the court may determine, by the verdict of a jury, if either party require it, the amount or justice of the claim; and if neither party require a jury, the court shall, by reference to a master or otherwise, decide upon the claim. [38 v. 146, § 195.]

PROCEEDINGS BY CREDITORS AGAINST THE HEIRS, DEVISEES, ETC., OF DECEASED DEBTORS.

§ 6217. Estate of deceased in the hands of heirs, etc.; liable for certain debts. After the settlement of any estate by an executor or administrator, and after the expiration of the time limited for the commencement of actions against him by the creditors of the deceased, the heirs, next of kin, widow as next of kin, devisees, and legatees of the deceased, shall be liable by action in the common pleas or superior court, in the manner provided in the following sections, for all debts which could not have been sued for, against the executor or administrator, and for which provision shall not have been made as hereinbefore provided. [38 v. 146, § 232.]

§ 6218. Heirs, etc., to contribute to pay claims after settlement of estate, and how. Any such creditor whose right of action shall first accrue after the expiration of the time of such limitation, and whose claim shall not have been presented to the court, or if presented shall not have been allowed, as hereinbefore provided, may recover the same against the heirs, widow as next of kin, and next of kin of the deceased, and the devisees and legatees under his will, each one of whom shall be liable to the creditor to an amount not exceeding the value, whether of real or personal estate, that he or she shall have received under the will, or by the distribution of the estate of the deceased: provided, that if by the will

of the deceased any part of his estate, or any one or more of the devisees or legatees, shall be made exclusively liable for the debt, in exoneration of the residue of the estate, or of the other devisees or legatees, the provisions of the will shall be complied with in that respect, and the persons and estate so exempt by the will shall be liable for only so much of the debt, if any, as can not be recovered from those first chargeable therewith; and, provided further, no such suit shall be maintained unless it be commenced within one year next after the time when the right of action shall first accrue, except the person entitled to bring any action mentioned in this section be, at the time the cause of action accrued, within the age of twenty-one years, if a male, and eighteen years if a female, a married woman, insane, or imprisoned, every such person shall be entitled to bring such action within one year after such disability is removed. [64 v. 57, § 233.]

§ 6219. **Estate of any heir, etc., liable after his death.** If any of the said heirs, next of kin, widow, devisees, or legatees, shall die without having paid his or her just proportion of such debt, his or her executors or administrators shall be liable therefor, as for his or her proper debt, to the extent to which he or she would have been liable if living. [38 v. 146, § 234.]

§ 6220. **Where two or more liable, creditor may proceed against all in one action.** If in the case specified in the two preceding sections, there should be more than one person liable for the debt, the creditor shall recover the same by one action against all the persons so liable, or as many of them as are within the reach of process; and the court shall thereupon determine, by the verdict of a jury if either party require it, what sum, if any, is due to the plaintiff; and they shall also decide, according to the equities of the case, how much each of the defendants is liable to pay toward the satisfaction of the debt, and render judgment accordingly. [38 v. 146, § 235.]

§ 6221. **Insolvency, etc., of heir or devisee not to effect liability of others.** If any one of the heirs, devisees, or others who were originally liable for the debt,

shall be insolvent, or unable to pay his proportion thereof, or shall be beyond the reach of process, the others shall, nevertheless, be liable to the creditor for the whole amount of his debt; provided, that no one shall be compelled to pay more than the amount received by him from the estate of the deceased. [38 v. 146, § 236.]

§ 6222. **Amendments allowed to bring in other parties.** No suit shall be dismissed or debarred for the want of including, as defendants, all the persons who might have been included; but in any stage of the cause the court may award proper process to bring in any other parties, and may allow such amendments as may be necessary to charge them, as defendants, upon such terms as the court shall think reasonable. [38 v. 146, § 237.]

§ 6223. **Heirs, etc., liable to contribution—How recoverable.** If, in consequence of insolvency, absence, or from any other cause, any one of the persons liable for such debt, shall fail to pay his just proportion thereof to the creditor, he shall be liable to indemnify all who shall, by reason of such failure on his part, have paid more than their just proportion of the debt—such indemnity to be recovered by all of them jointly, or in separate actions by any one or more of them, for his or their parts respectively, at their election. [38 v. 146, § 238.]

PROCEEDINGS WHEN THE ESTATE OF A DECEASED PERSON IS INSOLVENT.

§ 6224. **When estate insolvent, court to appoint commissioners to audit claims.** When it shall appear to the court, from the representation of an executor or administrator, that the real and personal estate of the deceased will probably be insufficient for the payment of his debts, the court may, in its discretion, appoint two or more fit persons to be commissioners to receive and examine all claims of creditors against the estate of the deceased, including those claims duly presented and allowed by the administrator or executor, and any and all other claims duly verified

and presented to them, and return to the court a list of all the claims that shall have been thus laid before them, with the sum that they shall have allowed on each claim; and the commissioners, before entering on the duties of their office, shall be sworn to the faithful discharge thereof. [85 v. 287.]

§ 6225. Commissioners to give notice of their meetings. The commissioners of insolvency shall appoint convenient times and places for their meetings, to receive and examine all claims of creditors as provided for in section 6224; and shall give notice thereof, in writing, to each of the creditors aforesaid by mailing the same to his post-office address; and further, by causing notifications to be posted up in some public places where the deceased last dwelt, or in such other manner as the court aforesaid, having regard to situation of the creditors of the estate, may order. [85 v. 287.]

§ 6226. Time allowed creditors to present and prove claims—Commissioners to report to court. The period of six months, after the appointment of the commissioners, shall be allowed to the creditors to present and prove their claims; and the court may allow such further time for this purpose, not to exceed eighteen months from the date of the commission, as they may think necessary, according to the circumstances of the case; and at the expiration of the time for the proof of debts, the commissioners shall make their written report to the court. [38 v. 146, § 203.]

§ 6227. Provisions for contingent debts. If, at the return of the list of claims against the estate, made out by the commissioners as hereinbefore provided, or made out by the executor or administrator, as hereinafter provided, any person shall be liable as a surety, for the deceased, or shall have any other contingent claim against his estate, which could not be proved as a debt under the commission, upon the presentation and proof thereof before the court, the court shall, in ordering a dividend, leave in the hands of the executor or administrator, a sum sufficient to pay to such contingent creditor, a proportion

equal to what shall then be paid to the other creditors. [38 v. 146, § 204.]

See 14 O. 391.

§ 6228. When contingent debt becomes absolute. If, at any time within four years after the date of the administration bond, such contingent debt shall become absolute, it may be allowed by the court, if not disputed by the executor or administrator; and, if disputed, may be proved before the commissioners already appointed, or others to be appointed by the court, in like manner as if presented before the first return of the list of claims against the estate. [38 v. 146, § 205.]

§ 6229. Dividend thereon—Disposition of residue. Upon the allowance of such claim, the creditor shall be entitled to a dividend thereon, equal to what shall have been paid to other creditors so far as the same can be paid without disturbing the former dividend; and if his claim shall not be finally established, or if the dividend due to him shall not exhaust the assets in the hands of the executor or administrator, the residue of the assets shall be divided among all the creditors who shall have proved their debts. [38 v. 146, § 206.]

§ 6230. Appeal from decision of commissioners, how perfected—Hearing and costs. Any person whose claim shall be disallowed, in whole or in part, by the commissioners, and any executor or administrator who shall be dissatisfied with the allowance of any claim may appeal from the decision of the commissioners to the probate court; if the creditor appeals he shall, within ten days after the decision, file with the commissioners a bond to the executor or administrator, with surety to be approved by the commissioners, in the sum of one hundred dollars, conditioned to pay all costs that may be adjudged against him on such appeal; the executor or administrator may appeal by giving notice to the commissioners within ten days; and in case of an appeal, the court shall, as soon as practicable, hear and determine the question as to the allowance or disallowance of the claim, and

shall adjudge the costs against the party failing on such hearing. [38 v. 146, § 207, 208.]

§ 6231. **How persons should proceed who have omitted to appeal.** Any person whose claim shall be disallowed by the commissioners, and who shall, by accident, mistake, or otherwise, and not by his own neglect, omit to claim or prosecute his appeal, as before provided, may, upon his petition, and notice thereof to the executor or administrator, be allowed by the court to claim and prosecute his appeal in manner aforesaid, upon such terms as the court shall impose, if it shall appear by affidavit that justice requires a further examination of his claim; provided, no such petition shall be sustained, unless it be presented within two years after the return of the commissioners, and within four years after the date of the administration bond, and before final distribution. [38 v. 146, § 209.]

§ 6232. **Allowance of appeal not to disturb distribution previously made.** The allowance of such appeal, and the judgment that may follow thereon, shall not disturb any distribution that may have been ordered before notice of the petition, or notice of the intention to present the same, shall have been given to the executor or administrator; but the debts, if any, proved and allowed in the case last mentioned shall be paid only out of such assets as may remain in or come to the hands of the executor or administrator after payment of the sums due on such prior order of distribution. [38 v. 146, § 210.]

§ 6233. **Commissioners examine claimants on oath.** The commissioners may, when they think it proper, require an oath to be administered to any claimant; and they may thereupon examine him upon all matters relating to his claim; and if he shall refuse to take such oath, or to answer fully to all questions that shall be lawfully put to him, the commissioners may disallow his claim, and on any appeal from the award of the commissioners, the court shall have the like power to examine the claimant on oath, and to disallow his claim, if he shall refuse to take the oath,

or to answer fully upon his examination thereon. [38 v. 146, § 211.]

§ 6234. **Any one of commissioners to administer oath.** Any one of the commissioners may administer the said oath to the claimant, and may also administer the oath to all witnesses produced and examined before the commissioners. [38 v. 146, § 212.]

§ 6235. **Distribution among creditors after commissioners return.** After the expiration of thirty days from the return made by the commissioners, the court shall make such an order for the distribution of the effects among the creditors as the case shall require; and if, before making such order, the court shall have notice of an appeal from the commissioners, then made or pending, they may suspend the order until the determination of such appeal, or they may order a distribution among the creditors whose debts are allowed, leaving in the hands of the executor or administrator a sum sufficient to pay the claimant whose demand is disputed, a proportion equal to what shall be paid to the other creditors. [38 v. 146, § 213.]

§ 6236. **When commissioners not appointed, executor or administrator to act as such.** If the court shall not think fit to appoint commissioners, as hereinbefore provided, when satisfied that the estate will probably be insolvent, the executor or administrator shall proceed, in the place of such commissioners, to receive and allow, if valid, the claims of creditors against the estate, and return to the court a list of all the claims that shall have been laid before him, with the sum allowed by him on each claim. [38 v. 146, § 214.]

New presentation and allowance of claim not required in such case, 1 C. C. R., 44.

§ 6237. **Executor or administrator shall give notice of insolvency of estate to creditors.** The executor or administrator shall, in such case immediately after the court shall declare the estate probably insolvent, give notice to creditors of the insolvency of the estate, and to present their claims to him, for allowance, within six months, by causing notifications to be posted up

in some public places in the township in which the deceased last dwelt, or in such other manner as the court aforesaid, having regard to the situation of the creditors of the estate, may order. [38 v. 146, § 215.]

§ 6238. **Form of notice.** The notice mentioned in the preceding section may be in substance as follows:

On the——day of ——, in the year——, the probate court of——county declared the estate of —— deceased, to be probably insolvent: Creditors are, therefore, required to present their claims against the estate to the undersigned, for allowance, within six months from the time above mentioned, or they will not be entitled to payment.

Signed:

Date:——

Executors or administrators, etc.

[38 v. 146, § 216.]

§ 6239. **Time allowed in such case for creditors to present claims.—List of claims to be filed.** The period of six months, after the court shall have declared the estate probably insolvent, shall in such case be allowed the creditors, to present their claims to the executors or administrators; and further time may be allowed therefor, in like manner as when commissioners are appointed to receive and audit claims; and the executor or administrator, after the expiration of the said period, shall file the list of the claims hereinbefore mentioned. [38 v. 146, § 217.]

§ 6240. **Claim disallowed may be submitted to referees.** If any claim, so presented to the executor or administrator to be allowed by him, shall be disallowed, in whole or in part, it may be referred to referees, by the agreement of the parties, and in the manner heretofore herein prescribed. [38 v. 146, § 218.]

§ 6241. **If not referred, creditors to commence suit—Limitation.** If such claim is not referred by the agreement of the parties, the creditor shall commence a suit thereon, within three months after such disallowance, or within three months after the same, or any part thereof, shall have become due, for the recovery thereof; and if no suit is commenced within the time aforesaid, the said claim shall be forever barred. [38 v. 146, § 219.]

§ 6242. Court or referee to award costs. In any suit or proceeding upon any claim mentioned in the preceding section, the referees or court, before whom the same shall be tried, may direct such costs to be awarded against the creditor, or against the executor or administrator, personally, or to be paid out of the assets of the estate, as a part of the costs of administration, as shall be just, having reference to the facts that appeared on the trial. [38 v. 146, § 220.]

§ 6243. How judgment to be rendered on disallowed claim. The judgment on the award, or in the suit upon the claim mentioned in the preceding section, shall be rendered in the same manner, and with the same effect, as is provided in the case of an appeal from the award of commissioners. [38 v. 146, § 221.]

§ 6244. When court to make order of distribution on return of list of debts. The court shall, after the expiration of thirty days from the return by the executors or administrators of the list of debts, make an order of distribution, as provided in the case of the return of the commissioners, except that the court may, if it thinks fit, first hear and determine any exceptions that may be filed by any person interested, against the allowance of any debts which have been allowed by the executor or administrator, and the court may make an order in relation to any suit pending against an executor or administrator, in like manner as is provided when an appeal is had, or pending, before or at the time an order of distribution is required, upon the report of commissioners. [38 v. 146, § 222.]

§ 6245. When court to make further order of distribution. If the whole assets should not have been distributed upon the first order of distribution, or if further assets should afterward come to the hands of the executor or administrator, the court shall make such further order or orders for the distribution thereof, as the case may require. [38 v. 146, § 223.]

§ 6246. Action against executor or administrator of insolvent estate. No action shall be brought against an executor or administrator after the estate is repre-

sented insolvent, unless it be for a demand that is entitled to a preference, and would not be affected by the insolvency of the estate, or unless the assets should prove more than sufficient to pay all the debts allowed by the commissioners, or unless a claim is presented and rejected, or disputed by the executor or administrator, before the estate is represented as insolvent, or unless the suit is brought against the executor or administrator, while acting in the place of commissioners, upon an estate represented to be insolvent, and upon a claim disallowed by such executor or administrator; and if an estate is represented insolvent, whilst an action is pending against an executor or administrator, for any demand that is not entitled to such preference, the action may be discontinued without the payment of costs; or, if the demand is disputed, the action may be tried and determined, and judgment may be rendered thereon, in the same manner and with the same effect as is provided in the case of an appeal from the award of the commissioners; or the action may be continued at the discretion of the court, until it shall appear whether the estate is insolvent, and if it should not prove to be insolvent, the plaintiff may prosecute the action as if no such representation had been made. [38 v. 146, § 224.]

§ 6247. Claims not presented as required, barred unless, etc. Every creditor of an estate that proves to be insolvent, who shall not have presented his claim for allowance, in the manner prescribed herein, shall be forever barred from recovering the same, unless further assets of the deceased shall come to the hands of the executor or administrator, after the order of distribution, in which case, his claim may be proved, allowed, and paid, in the manner and with the limitations herein provided for the case of contingent debts. [38 v. 146, § 225.]

§ 6248. If surplus remain after paying debts allowed, other creditors may claim it. If, after the report of the commissioners of insolvency, or of the executor or administrator acting in their place, the assets shall prove to be sufficient to pay all the debts allowed

under the commission, or under the report of the executor or administrator, as the case may be, the executor or administrator shall pay the same in full; and if, after such order is made, any other debts shall afterward be recovered against him, he shall be liable therefor only to the extent of the assets then remaining in his hands. [38 v. 146, § 226.]

§ 6249. **How divided between two or more such creditors.** If there be two or more such creditors, the assets, if not sufficient to pay their demands, in full, shall be divided among them, in proportion to the amount of their respective debts. [38 v. 146, § 227.]

§ 6250. **Executor or administrator liable only for assets in his hands.** The executor or administrator shall, in such case, be permitted to prove the amount of the assets in his hands, and thereupon judgment shall be rendered in the usual form; but execution shall not issue for more than the amount of such assets; and if there is more than one judgment, the court shall apportion the amount between them. [38 v. 136, § 228.]

§ 6251. **Creditor may sue after three years in case, etc.** If it shall not be ascertained, at the end of three years after the granting of letters testamentary, or of administration, whether any estate that has been represented insolvent, is, or is not so in fact, any creditor whose claim shall not have been presented before the commissioners, or to the executor or administrator who may be acting in the place of commissioners, may commence an action therefor, against the executor or administrator; and such action may be continued for the defendant, until it shall appear whether the estate is insolvent; and if it should not prove to be so, the plaintiff may prosecute his action as if no such representation had been made. [38 v. 146, § 229.]

§ 6252. **When and how executor or administrator may be compelled to render his account to court.** If any executor or administrator shall neglect to render and settle his accounts in court, within six months after the return made by the commissioners, or by the executor or administrator, in their place, or after the

final liquidation of the demands of the creditors, or within such further time as the court may allow to collect the debts and assets, so as to delay an order of distribution, he may be compelled to render such account, in the manner hereinbefore directed, to compel the return of an inventory; and the same proceedings may be had to attach him, and to discharge him, and the like revocation of the letters granted to him may be made in case of the party absconding or concealing himself, so that no order can be personally served, or of his neglecting to render an account within thirty days after being committed; and new letters shall be granted with the like effect, and like remedies on the administration bond, as in those cases. [38 v. 146, § 230.]

§ 6253. **Compensation of Commissioners.** The court shall allow the commissioners such compensation as it may deem reasonable, for their services, which shall be paid by the executor or administrator, as a part of the costs of administration. [38 v. 146, § 231.]

CHAPTER III.

GUARDIANS AND TRUSTEES OF MINORS.

§ 6254.. **Probate court to appoint guardians.** The probate court in each county shall, when necessary, appoint guardians of minors resident in such county. [55 v. 54, § 1.]

§ 6255. **Guardian of the estate, of the person.** A guardian may be appointed to take charge only of the estate of a minor; and at the time of, or subsequent to, the appointment of such guardian to any minor having neither father nor mother, or whose father and mother are both unsuitable persons to have the custody, and tuition of such minor, or whose interests will, for any other cause, in the opinion of the court, be promoted thereby, the court may also appoint a guardian to have the custody and provide for

the maintenance and education of such minor: provided, however, that if the powers of the person appointed guardian be not limited by the order of appointment, the person so appointed shall be guardian both of the person and estate of the ward; and the court shall in every instance appoint a guardian both of the person and estate of the ward, unless the interests of the minor will, in the opinion of the court, be promoted by the appointment of separate guardians, as hereinafter [hereinbefore] prescribed. [55 v. 54 § 2.]

The guardian must give bond before he can act, 20 O. 327. He can only be appointed for a resident minor, 12 O. 195. He derives his power to act from the appointment and giving bond. Letters of guardianship need not in fact issue. *Id.* Proceedings for the appointment of a guardian are proceedings *in rem*. The actual presence of the ward is not necessary, 16 O. 8. 455. Probate court has exclusive jurisdiction. 16 O. S. 455; 88 O. S. 430.

§ 6256. **Who ineligible as guardian.** No person who may have been, or shall be, an administrator on an estate, or executor of a last will and testament, shall be appointed a guardian of the person and estate, or of the estate only of any minor who shall be interested in the estate administered upon, or who shall be entitled to any interest under or by virtue of such last will and testament; but an executor or administrator may be appointed a guardian of the person only of any minor. [55 v. 54, § 3.]

Administratrix of estate in which minor interested ineligible, 35 O. S. 550.

§ 6057. **When minor may choose guardian; or court may appoint.** Any male infant over the age of fourteen years, or a female infant over the age of twelve years, shall have the right to select a guardian, who, if a suitable person, shall be appointed; but if such minor shall fail to select a suitable person, an appointment may be made without reference to the wishes of such minor. A minor shall not, in any instance, have the right to select one person to be the guardian of his or her estate only, and another person to be guardian of his or her person only, unless the court having the power of appointment shall be of opinion that the interests of such minor will be promoted by the choice and appointment of such separate guardians,

instead of one guardian, both of the person and estate. [55 v. 54, § 4.]

§ 6258. **How long powers of guardian to continue—his settlement.** When a guardian has been appointed for any minor before he or she shall have attained the age for making a selection, as fixed in the last preceding section, the powers of such guardian shall continue until the ward shall arrive at the age of majority, unless such guardian be sooner removed for good cause, or such ward shall select another suitable guardian. After such selection is made and approved by the court, and the person so selected is duly appointed and qualified, the powers of the guardian previously appointed shall cease, and thereupon the final account of such guardian shall be filed and settled in the proper court. [55 v. 54, § 5.]

Under a previous statute the guardianship of a minor female ward expired when she arrived at the age of twelve, 11 O. 442, and a sale of land by the guardian after such ward arrived at the age of twelve was held void, *Id.*

§ 6259. **Statement of ward's estate to be filed and bond given—mortgage in lieu of freehold surety—oath.** Before any person shall be appointed guardian of the person and estate, or of the estate only, of any minor, he shall file in the office of the court having such appointment to make, a statement of the whole estate of said minor, and the probable value thereof, and also the probable annual rents of such minor's real estate, and shall verify the same by affidavit, and shall give bond, with freehold sureties, resident of the state, one of whom shall be resident of the county where such guardian is appointed, payable to the state, in double the amount of the personal estate belonging to said minor, and also of the gross amount of rents that will be probably received by the guardian from the real estate of said minor during his or her minority; provided, that in lieu of freehold surety, such person may execute to said minor a mortgage upon good and unincumbered real estate, first furnishing to said probate court an abstract of his title thereto, which shall by affidavits duly filed be shown to be in value, exclusive of all improvements thereon,

sufficient so secure said bond to the satisfaction of said probate court, which mortgage shall be duly recorded in the county in which such real estate is situate, and filed with such probate court; which bond shall be conditioned for the faithful discharge of the duties of said person, as such guardian, and shall be approved by the court making such appointment; and such person shall also take an oath that he will faithfully and honestly discharge the duties devolving upon him as such guardian. [55 v. 54, § 6.]

Application for appointment of guardian.—To the Hon.—, Judge of the Probate court of — county, Ohio:

Your petitioner represents it to be necessary that the court appoint a guardian for the following named minors, residing in said county, to-wit: A. B., aged one year and C. B., aged two years, children of D. B. and E. B., deceased. Your petitioner makes this application to be appointed guardian for the person and estate of said minors, and he represents that said minors have an estate consisting of

Probable value of real estate... \$ ———

“ “ “ personal estate... \$ ———

“ annual rents of real estate... \$ ———

He offers as sureties on his bond for \$ ——— residence, ——— residence, ——— residence.

[Signed] X. Y.

Petitioner's residence, ———

Petitioner's place of business, ———

———, Attorney.

Office, ———

State of Ohio, — county, ss: Personally appeared before me the undersigned, Judge of the Probate court in and for said county, X. Y., who upon oath, deposeth and saith that the foregoing statement is true to the best of his knowledge, and that he will faithfully and honestly discharge the duties devolving upon him as guardian for the person and estate of the foregoing named minors, as required by law. [Signed] X. Y.

Sworn to and subscribed before me this — day of — 188—

——— Probate Judge.

Form of bond.—Know all men by these presents, that we, X. Y., G. H. and I. J., of the county of — and State of Ohio, are held and firmly bound unto the State of Ohio, in the sum of — dollars, for the payment whereof well and truly to be made, we bind ourselves, and each of us, our heirs, executors, and administrators firmly by these presents. Whereas the Judge of the Probate court of said county on the — day of —, appointed X. Y. guardian of the estate [or person and estate] of A. B., aged one year and C. B., aged two years, children of D. B. and E. B., deceased. Now the condition of the above obligation is such that if the said guardian shall faithfully discharge his duties as such guardian, then the above obligation to be void, otherwise to remain in full force.

Signed at —, this — day of —, 188—.

Witness.

Letters of guardianship.—State of Ohio, ——— county, ss:
To all who shall see these presents, greeting.

Know ye that the Honorable, the Judge of the Probate court of ——— county and State of Ohio, has nominated and appointed and by these presents does appoint X. Y., guardian of the estate, [or person and estate] of A. B., a minor aged one year, and C. B., a minor aged two years, children of D. B. and E. B., deceased, hereby granting to said guardian all and singular powers necessary and by law required to enable him fully to do, act and perform all and singular, the duties of such guardian for the aforesaid minors agreeably to the statute in such cases made and provided.

In testimony whereof, etc.

§ 6260. **Bond of guardian of person—oath.** Before a person is appointed guardian to have the custody, maintenance, and tuition of a minor, without the right to take charge of the estate of such minor, he shall give bond in double the probable expenses of maintaining and educating such minor during one year; in all other respects his bond shall be the same as if he had charge of the estate of his ward, and he shall take the same oath as is prescribed in the preceding section. [55 v. 54, § 7.]

§ 6261. **Exceptions to bond—additional bond.** Exceptions may be filed in the proper court, by any person on behalf of any minor for whom a guardian has been or may be appointed, to the bond of such guardian, as to the sufficiency of the amount of the penalty thereof, or the sureties therein; whereupon notice shall be given to such guardian to appear before said court within a reasonable time, not exceeding ten days, and show cause against the allowance of the exceptions; and upon the hearing of such exceptions the court may dismiss the same, or require such guardian to find additional sureties or security in a larger amount, or make such other order as the case may require; and it shall be the duty of the court by which any guardian is appointed, to require, of its own motion, such guardian to give additional bond whenever, in the opinion of said court, the interests of the ward of such guardian shall demand the same. [55 v. 54, § 8.]

Additional bond, sureties on both responsible, 3 Cush. 465; 33 Pa. St. 442.

§ 6262. Bond not void on account of informality. No bond executed by a guardian shall be void, or held invalid on account of any informality in the same, nor on account of any informality or illegality in the appointment of such guardian; but such bond shall have the same force and effect as if such appointment had been legally made and such bond executed in proper form. [55 v. 54, § 9.]

36 O. S. 460; 47 Am. Dec. 41; 60 N. C. 175; 13 Gratt (Va) 175; 46 Am. Dec. 81; 27 Vt. 202, see 16 O. S. 453; 12 Allen, 138.

§ 6263. One bond for two or more wards, etc.,—fees. When the same person shall be appointed guardian of several minors, being children of the same parentage and inheriting from the same estate, separate bonds shall not be required; and in such cases only one application shall be required, and the letters of guardianship to be issued to such guardian by the court shall be in one copy, and not one for each minor; and the court approving and recording such bond, and issuing such letters, shall charge such fees as are allowed by law for such services, to be charged but once, and not once for each ward of such guardian. [63 v. 43, § 10.]

10 W. L. J. 163.

§ 6264. Powers of guardian of person and estate—rights of parents. Every person appointed guardian both of the person and estate of a minor, shall have the custody and tuition of his ward, and the management of such ward's estate during minority, unless sooner removed or discharged from such trust, or the guardianship shall sooner determine from any of the causes specified in this chapter; provided, that the father of such minor, or if there be no father, the mother, if suitable person, respectively, shall have the custody of the person and the control of the education of such minor. [55 v. 54, § 11.]

§ 6265. Effect of marriage of female ward. The marriage of a ward, if a female, shall determine the guardianship as to the person, but not as to the estate of such ward. [55 v. 54, § 12.]

§ 6266. Parent may, by will, appoint a guardian for minor children. Any father, or in case the father be dead or have gone to parts unknown, any mother may, by last will in writing, appoint a guardian or guardians, for any of his or her children, whether born at the time of making the will, or afterward, to continue during the minority of the child, or for a less time. [50 v. 297, § 72.]

§ 6267. Testamentary guardian to have preference—His duties, powers and liabilities. When a guardian has been appointed by will, by a father or mother of any child, such guardian shall be entitled to preference in appointment over all others, without reference to his place of residence, or the choice of such minor, but his appointment, duties, powers and liabilities shall in all other respects be governed by the law regulating guardians not appointed by will, except as otherwise specially provided. [55 v. 54, § 13.]

§ 6268. When testamentary guardian shall give bond, etc. Every such testamentary guardian shall give bond, in like manner and with like conditions, as is required of a guardian appointed by the probate court; provided, that when the testator, in the will appointing the guardian, shall have ordered or requested that such bond should not be given, the bond shall not be required, unless, from a change in the situation or circumstances of the guardian, or for other sufficient cause, the court of probate shall think proper to require it. [50 v. 297, § 73.]

§ 6269. Duties of guardian of person and estate. The following shall be the duties of every guardian of any minor who may be appointed to have the custody of such minor and take charge of the estate of such minor, to-wit:

First—To make out and file within three months after his appointment, a full inventory, verified by oath, of the real and personal estate of his ward, with the value of the same, and the value of the yearly rent of the real estate; and failing so to do for thirty days after he shall have been notified of the expira-

tion of the time by the probate judge, said probate judge shall remove him, and appoint a successor.

Second—To manage the estate for the best interests of his ward.

Third—To render on oath to the proper court an account of the receipts and expenditures of such guardian, verified by vouchers or proof, once in every two years, or oftener, upon the order of the court, made upon motion of any person interested in said ward or the property of such ward, for good cause shown by affidavit, and failing so to do for thirty days after he shall have been notified of the expiration of the time by the probate judge, he shall receive no allowance for services, unless the court shall enter upon its journal that such delay was necessary and reasonable; provided, that in all cases where the whole estate of said ward or of several wards jointly, under the same appointment of guardianship, shall not exceed two hundred dollars in value, said guardian shall only be required to render such account upon the termination of said guardianship, or upon the order of said court, made upon its own motion or the motion of some person interested in said ward or wards, or in his, her or their property, for good cause shown, and set forth upon the journal of said court.

Fourth—At the expiration of his trust, fully to account for and pay over to the proper person all of the estate of his ward remaining in his hands.

Fifth—To pay all just debts due from such ward, out of the estate in his hands, and collect all debts due such ward, and in case of doubtful debts to compound the same, and appear for and defend, or cause to be defended, all such suits against such ward.

Sixth—When any ward has no father, or having a father who is unable or fails to educate such ward, it shall be the duty of his guardian to provide for him such education as the amount of his estate may justify.

Seventh—To loan or invest the money of his ward within a reasonable time after he receives it, in notes

or bonds secured by first mortgage on real estate of at least double the value of the money loaned or invested, exclusive of improvements, timber, or minerals subject to destruction, or exhaustion; in bonds of the United States or of any state on which default has never been made in payment of interest, or bonds of any county or city in this state issued in conformity to law; or, with the consent and approbation of the probate court, in productive real estate within this state, the title to which shall be taken in the name of the guardian as such; and to manage such investments, and when deemed proper, change the same into any other investments of the above classes; but no real estate so purchased shall be sold by the guardian except with the consent and approbation of the probate court; and if said guardian fail to loan or invest the money of his ward within such reasonable time, he shall account on settlement for such money and interest thereon, calculated with annual rests; and also to settle and adjust, when necessary or desirable, the assets which he may receive in kind from an executor or administrator, as may be most advantageous to his wards. But before such settlement and adjustment shall be valid and binding, it shall be approved by the probate court, and such approval entered on its journal; and with the like approval to hold the assets as received from the executor or administrator, or what may be received in the settlement and adjustment of said assets.

Eighth—To obey and perform all the orders and judgments of the proper courts touching the guardianship. [77 v. 77; 69 v. 55, § 14.]

Inventory of the real and personal estate, with the value of the same, and the value of the yearly rent of said estate, belonging to A. B., minor child of C. D., deceased.

Description of personal estate and value thereof,	VALUE.	
	\$	CTS.
Total value of personal estate, . . .	\$	
Description of real estate and value thereof, and the yearly rent of same.		
Total value of real estate and yearly rent of same,		
<i>Recapitulation.</i>		
Total value of personal estate, . . .	\$	
“ “ “ real estate, . . .		
“ “ “ yearly rent of real estate, . . .		

State of Ohio, _____ county, ss. Personally appeared before me, the undersigned, judge of the probate court in and for said county, E. F., guardian of the person and estate of A. B., minor, who, upon oath deposeth and saith that the annexed is a full inventory of the real and personal estate of the said minor, with the value of the same, and the value of the yearly rent of said real estate according to the best of his knowledge.

E. F.

Sworn to before me and subscribed in my presence this—
day of — —188—

Probate Judge.

By _____ Deputy Clerk.

Notes.—Guardian has no authority to convert land scrip, 11 O. S. 581, and can not assign it without an order of court, 28 O. S. 503, but land scrip converted in good faith does not make him a trustee, 15 O. 655. Lien given by guardian binds ward, 2 O. 401.

The settlement of guardian's account is exclusively within the jurisdiction of the probate court, 43 O. S. 36. Failure to settle account within time prescribed by law, a breach of his bond, 10 W. L. J. 163; failure to pay balance to minor is not, 17 O. S. 548. See § 6289.

The removal of a guardian for cause by the probate court is within the meaning, 69 v 55 requiring the guardian at the expiration of his trust fully to account for and pay over to the

proper person all the estate of his ward remaining in his hands, 48 O. S. 86. He could be sued on bond without settlement, 7 O. (pt. 1) 223; but now only after settlement, 38 O. S. 430; 43 O. S. 86; 12 Bull 197. Delay does not discharge sureties, *Id.* Sureties liable for all money received, 35 O. S. 550. Liability of substituted surety for profits on sale of real estate by guardian, 44 O. S. 178. Surety on guardian's bond having paid judgment against him is entitled as against assignee in bankruptcy to subject trust property to payment of claim, 12 Bull 199.

The action of an infant must be brought by his guardian or next friend, and when the action is brought by his next friend the court may dismiss it, if it is not for the benefit of the infant, or substitute the guardian or any person as the next friend, § 4998. Next friend is liable for costs of action brought by him, and if insolvent the court may on motion require security therefor, § 4999.

The defense of an infant must be by a guardian for the suit, who may be appointed by the court in which the action is prosecuted, or by a judge thereof, or by a probate judge, § 5003.

The appointment of guardian ad litem may be made upon the application of the infant, if, being of the age of fourteen years, he apply within twenty days after the return of the summons, or service by publication; and in case of his being under said age, or of his neglect so to apply, the appointment may be made on the application of the plaintiff, or a friend of the infant; but the appointment can not be made until after service of summons, or publication, § 5004.

A guardian can appear for his ward, 21 O. S. 651, and answer, 7 O. (pt. 1) 198; 7 O. (pt. 2) 138.

Answer of guardian.—The guardian of an infant, or of a person of unsound mind, or an attorney for a person in prison, shall deny in the answer all material allegations of the petition prejudicial to such defendant, § 5078.

Where an action is prosecuted by A., guardian of B. on an instrument payable to "A, guardian of B," the fact that the ward becomes of age pending the suit affords no grounds to abate it, 39 O. S. 607.

Negligence of guardian suffering former guardian to collect funds, 16 Bull 109. Power of guardian to make contract with attorneys to prosecute claim in which ward is interested for compensation contingent on success, 11 Bull 246.

Chargeable with interest, 6 O. 118, 124, see W. 562; 10 W. L. J. 16; 17 N. H. 609; with compound interest in case of fraud, 46 Ala. 237; 12 B. Mon. 187. Liable in making investment for loss sustained by failure to exercise proper diligence, 11 Bush 120; 46 Vt. 678; 8 Ired (N. C.) Eq. 285; 43 N. H. 465; 50 Miss. 238; 26 N. J. Eq. 509; for using funds for his own benefit, 41 Ala. 499; 55 Pa. St. 110.

§ 6270. *Duties of guardian of estate only.* When the guardian is appointed to take charge only of the estate of a minor, his duties shall be the same as those specified in the preceding section, except that he shall not be required to perform the sixth duty therein mentioned when a guardian of the person of such minor has been appointed. [55 v. 54, § 15.]

§ 6271. **Duties of guardian of the person, etc.** When a guardian is appointed to have the custody, maintenance, and education of a minor, his duties shall be as follows: First—To protect and control the person of his ward. Second—To provide a suitable maintenance for his ward, when necessary, which shall be paid out of the estate of such ward in the hands of the guardian of such estate, upon the order of the guardian of the person of such ward. Third—When such ward has no father or mother, or having a father or mother, and such parent is unable or fails to maintain or educate such ward, it shall be the duty of the guardian so appointed to provide for him such maintenance and education as the amount of his estate may justify, which shall be paid out of the estate of such ward in the hands of the guardian of such estate, upon the order of the guardian of the person of such ward. Fourth—To obey and perform all the orders and judgments of the court touching the guardianship. [55 v. 54, § 16.]

§ 6272. **Removal of guardian—His removal from State ends guardianship.** The probate court may at any time remove any guardian, he having thirty days' notice thereof, for habitual drunkenness, neglect of his duties, incompetency, fraudulent conduct, removal from the county, or any other cause which, in the opinion of such court, renders it for the interest of the ward that such guardian be removed; the removal from the State of any person who has been heretofore or who may be hereafter appointed guardian, shall of itself determine the guardianship of such person. [55 v. 54, § 17.]

See § 6017 and *note*.

§ 6273. **Release of surety of guardian—extent of liability.** Any surety of a guardian may, at any time, apply to the proper probate court to be released from his bond of such guardian, by filing his request therefor with the judge of such court, and giving ten days' notice to such guardian, when application will be made to such court to release such surety; and if such guardian fail to give new bond, as by such court,

directed, he shall be removed and his letters superseded, but such original surety shall not be released until such guardian so gives bonds, and such original surety shall be liable only for the acts of such guardian from the time of the execution of the original bond to the filing and approval by the court of such new bond. [55 v. 54, § 18.]

See § 6204 *et seq.*, 6269*n.*

In an action upon a guardian's bond for the recovery of the amount found due the ward upon a final settlement of the guardian's accounts in the probate court, the sureties are concluded by the settlement, in the absence of fraud and collusion to question its correctness or to demand a re-hearing of the accounts, 44 O. S. 339. Surety discharged after embezzlement of guardian and new bond given not discharged from liability on bond, 42 O. S. 549, see 1 C. C. R. 285. Sureties not released by ward's receipt in full to guardian after majority without payment in fact, 8 Bull 29. Jurisdiction of superior court in action on guardian's bond, *Id.* To maintain an action upon a guardian's bond for money of the ward not paid over by the guardian, the amount must first be ascertained by the probate court upon a settlement of his accounts, 12 Bull 197; 38 O. S. 430. The probate court has power to compel such settlement by a non-resident guardian or on his default to ascertain the amount upon evidence. Notice to him may be as provided, § 6406, 12 Bull 197.

A guardian of the person and estate of a minor having received, after giving bond, money belonging to his ward and converted it to his own use, the subsequent resignation of the guardian, and his removal to and re-appointment and qualification in another state and filing an account there, in which he charged himself with the amount found due by the former court at the time of his resignation, will not exonerate the sureties on the first bond, with respect to the money so converted, but they will be liable upon the ground that the guardian failed to faithfully perform his duties. Nor will the fact that before such second appointment he was selected by his ward as her guardian, operate to release such sureties, 1 C. C. R. 285.

§ 6274. **Resignation of guardian, etc.** The court by which any guardian has been or may be appointed, may, for reasons satisfactory to such court, accept the resignation of any such guardian and appoint another in his stead. [55 v. 54, § 19.]

When a guardian is superseded and another guardian appointed in his stead proceedings in an action against the former as such after he has been superseded will not operate against or bind the ward or the succeeding guardian, 2 O. 401.

§ 6275. **Guardians duties enforced.** It shall be the duty of the court by which any guardian has been or

may be appointed to enforce the return, at the prescribed times, of all inventories and accounts required to be filed in such court by such guardian, and also to enforce the performance of all other duties devolving upon guardians appointed by such court, either with or without complaint being first made, and thereupon to make and enter such judgments and orders as may be requisite in any case to promote the faithful and correct discharge of the duties of such guardians, or to preserve the estate of minors for whom such guardians may have been or shall be appointed. [55 v. 54, § 20.]

41 O. S. 206.

§ 6276. **Effect of removal of ward from state—and appointment of foreign guardian.** When a minor, for whom a guardian has been appointed in this state, shall remove to another state or territory, and a guardian of such infant shall be there appointed, the guardian appointed in this state may be removed, and required to settle his account as hereinafter provided. [55 v. 54, § 17.]

§ 6277. **When and under what circumstances the guardian here may be removed.** Such removal shall not be made unless the guardian appointed in another state or territory shall apply to the probate court in this state which made the former appointment, and file therein an exemplification from the record of the court making the foreign appointment, containing all the entries and proceedings in relation to his appointment, and his giving bond, with a copy thereof and of the letters of guardianship, all authenticated as required by the act of congress in that behalf; and before such application shall be heard, or any action taken therein by the court, at least thirty days' written notice shall be served on the guardian appointed in this state, specifying the object of the application and the time when the same will be heard: provided, no such removal shall be made in favor of any foreign guardian, unless at the time of the hearing the state or territory in which he was appointed has made a similar provision as to wards removing from such state or territory; and provided, further, that the

court may, in any case, deny the application unless satisfied that the removal of the guardian appointed in this state would be to the interest of the ward. [65 v. 7, § 2.]

§ 6278. **What to be done if guardian here removed.** If the court, on such hearing, remove the guardian, the court may cause all suitable orders to be made discharging the resident guardian, and authorizing the paying over and delivery to the foreign guardian all moneys and other property in the hands of the resident guardian after his settlement. [65 v. 7, § 2.]

§ 6279. **When foreign guardian of foreign ward may demand or receive property of his ward in this State.** In any case in which a guardian not appointed in this State and his ward are both non-residents of this State, and the ward is entitled to money or other property in the lawful custody of any executor, administrator, or other person in this State, such guardian may, by the order of the probate court of the proper county, upon filing therein the proofs named in the second preceding section, and giving notice to such custodian as therein prescribed, be permitted to demand, receive, or recover, by suit, such money or other property, and remove the same, unless the terms of limitation attending the right by which the ward owns the same, conflict with such removal. [65 v. 7, § 1.]

Foreign guardian ineligible to appointment as such in Ohio will not be permitted to collect money due the ward in this State, 19 Bull 106.

§ 6280. **Sale of personal and real estate of minors—**One application for sale of real estate of two or more wards—Two or more guardians may join. The guardian of the person and estate, or of estate only, shall have power, when for the interest of the ward, to sell all or any part of the personal estate of the ward, and whenever necessary for the education, support, or payment of just debts of any minor, or for the discharge of any liens on the real estate of such minor, or whenever the real estate of such minor is suffering unavoidable waste, or a better investment of the value thereof can be made, and the court shall be

satisfied that a sale thereof will be for the benefit of any minor, the probate court by which a guardian of the person and estate, or of the estate only, has been appointed, may, on the application of such guardian, order the real estate of such minor, or a part thereof, situate in this State, to be sold; and where any person is such guardian for two or more minors whose real estate is owned by them jointly, or in common, the guardian may in one application ask for the sale of the interest of all or any number of his wards in such real estate; and where different persons are guardians of minors so interested jointly, or in common, in the same real estate, such guardians may join in one application; and on the hearing, in either case, the court may authorize the sale of the interest of one or more or of all such wards, as, in its discretion, it may deem right and proper. [56 v. 88, § 22; 59 v. 19, § 1.]

The power to sell real estate does not exist independent of statute, 33 Mo. 18; 47 N. Y. 21; 6 R. I. 296; 5 Hill (N. Y.) 415; 14 S. & R. 435; 18 Gratt (Va.) 651, see 30 Mich. 836; 35 Ia. 521; 19 Ill. 295. The statute must be strictly followed, 20 Cal. 352; 24 Ia. 131; 41 Pa. St. 120; 47 Ill. 278; 2 Pet. (U. S.) 157; 25 Mo. 584. Conversion of ward's real estate into personal does not alter course of descent, 16 Bull 271.

§ 6281. **Petition for sale of real estate.** Such application for sale of real estate shall be by petition, which shall set forth, specifically: First—The value and character of all personal estate belonging to such ward that has come to the knowledge or possession of such guardian. Second—The disposition made of such personal estate. Third—The amount and condition of such ward's personal estate, if any, dependent upon the settlement of any decedent's estate, or the execution of any trust. Fourth—The annual value of the real estate of the ward, with a pertinent description of such real estate. Fifth—The amount of rent received, and the application thereof. Sixth—The proposed manner of re-investing the proceeds of the sale, if asked for that purpose. Seventh—Each item of indebtedness, or the amount and character of the lien, if the sale is prayed for the discharge thereof. Eighth—The age of the ward,

where and with whom residing. Ninth—If there be no personal estate belonging to such ward in possession or expectancy, and none has come into the hands of such guardian, and no rents have been received, the fact shall be stated in the petition: If it is desired that the land sought to be sold, or any part thereof, shall be laid out in town lots, that fact shall be stated and the reasons therefor, and the manner in which the same is to be laid out. [55 v. 54, § 23; 52 v. 76, § 1, 2.]

The petition must contain a description of all the real estate of the ward, and when the contrary does not appear it will be presumed that the real estate described in the petition includes all that the ward owns, 26 O. S. 636.

§ 6282. **Notice of filing petition, etc.** Upon such petition being filed, verified by the oath of the guardian, the court shall order the petitioner to give notice to his ward, who shall be defendant to the petition, of the filing and demand thereof, and the time when the same will be heard, in such manner as to the court shall seem reasonable and proper. [55 v. 54, § 24.]

§ 6283. **Hearing of petition—Appraisers—Survey into town lots.** At the time appointed for the hearing of said petition, and being satisfied that the notice named in the last preceding section has been given, and that such real estate ought to be sold, the court shall appoint three freeholders of the county in which said real estate shall be situated, who are not of kin to the petitioner, to appraise said real estate; and if such petition seeks to have the land or any part thereof laid out into town lots, and the court finds that it will be to the advantage of the ward to have the same done, the court shall also authorize the survey and platting of the land for that purpose. [56 v. 88, § 25; 52 v. 76, § 2.]

Judgment and order to appraise, see § 6155.

§ 6284. **Oath of appraisers,** Said appraisers shall take an oath to truly and impartially appraise said real estate at the fair cash value, which oath shall be

indorsed on the certificate of their appointment, or order of sale issued by the court. [55 v. 54, § 26.]

§ 6285. Guardian to execute bond before sale. Upon the appraisement of said real estate being filed, signed by said appraisers, the court shall require such guardian to execute a bond, with sufficient freehold sureties, payable to the state in double the appraised value of such real estate, with condition for the faithful discharge of his duties, and the faithful payment, and accounting for, of all moneys arising from such sale according to law. [55 v. 54, § 27.]

Form of report of appraisers, see under § 6157.

[*Follow form under § 6150 to * and continue.*] The condition of the above obligation is such that whereas, the above bound A. B. was heretofore appointed guardian of the estate of X. Y., a minor child of _____ county, Ohio; and which appointment the said A. B. accepted and gave bond and took the oath required by law.

And, whereas, the said A. B. as such guardian has made application to the probate court of _____ county for an order to sell certain real estate of said minor which, under proceedings in said court duly had, has been appraised at the sum of _____ dollars.

And, whereas, said court has ordered said A. B. to execute a bond as such guardian according to the statute in such cases made and provided.

Now, therefore, if the said A. B. shall faithfully discharge his duties as guardian of the aforesaid X. Y. and shall faithfully make payment and account for all moneys arising from such sale according to law, then this obligation to be void; otherwise to remain in full force. [Signed.]

Executed in presence of _____

§ 6286. Order of sale of real estate—private sale when—laying out in town lots. Upon such bond being filed and approved by the court, it shall order the sale of such real estate, at auction, for not less than two-thirds of the appraised value thereof, providing in the order for reasonable notice and the place of such sale in the county in which such real estate shall lie; and the credit to be given for the payment of the purchase money, and the deferred payments of the purchase money shall be secured by a mortgage executed by the purchaser on the real estate sold, and they shall bear interest at the legal rate per annum from the day of sale, payable annually: provided, however, that if it is made to appear to such probate court that it will

be more for the interest of said ward to sell such real estate at private sale, it may authorize said guardian to sell the same at private sale, either in whole or in parcels, and upon such terms of payment as may be prescribed by the court; and in no case shall such real estate be sold at private sale for less than the appraised value thereof; and if the petition includes an application for the laying out into town lots of the land to be sold, or any part thereof, and the court approve the survey and plat made for that purpose, the court shall also authorize the guardian, on behalf of his ward, to sign, seal, and acknowledge the plat in that behalf for record according to law. [64 v. 14, § 28; 56 v. 88, § 25; 52 v. 76, §§ 1, 2,]

Forms.—Order for public or private sale § 6161.—Notice of sale § 6159. Sale of land without giving bond not void, 42 O. S. 254; 26 *Id.* 636; 16 Bull. 89.

§ 6287. Report of sale, confirmation and deed. Upon the return of the order of sale issued by the court, such guardian shall make report of the sale by him made; whereupon the court, on being satisfied that such sale was fairly and legally made, shall confirm the same, and order the petitioner to execute a deed of conveyance for the real estate so sold, upon the purchaser securing the deferred payments of the purchase money in the manner prescribed in the last preceding section. [55 v. 54, § 29.]

Forms.—Report of sale; when no sale effected. Order of re-appraisement, § 6162. Confirmation, etc., and deed, § 6162. Doctrine of *caveat emptor* applies, 32 Ga. 376; 86 Ill. 523; 1 Neb. 254; 3 O. S. 277; 13 Pa. St. 124; 9 Wheat. (U. S.) 116; see 8 Mass. 162; 10 O. S. 557; 52 Am. Dec. 463; 9 Cal. 181.

§ 6288. Guardian's compensation. Every guardian shall be allowed, by the court settling his account, the amount of all his reasonable expenses incurred in the execution of his trust; and also such compensation for his services as the court shall deem reasonable. [55 v. 54, § 30.]

See § 6188. Loss through ignorance when acting in good faith does not deprive guardian of all compensation, 12 Bull. 59, see 15 Pick. 471; 65 N. C. 265; 11 Vt. 122; 84 Ala. 442; 3 Johns Ch. 48; 29 Ga. 758; 32 Me. 159; 46 Pa. St. 347; 46 Vt. 678; 23 Ark. 47; 12 Gratt (Va.) 608.

- **§ 6289. Effect of settlement with court. When and how ward may review settlement.** The settlement made in the probate court of the accounts of a guardian shall be final between him and his ward, unless an appeal be taken therefrom to the court of common pleas in the manner provided by law; saving, however, to any such ward the right of opening and reviewing such settlement, for fraud or manifest mistake, by civil action in the court of common pleas of the county in which such settlement was made, or the county where such guardian may reside when the petition is filed, at the option of the plaintiff in such action, at any time within two years after the said ward shall arrive at full age. [55 v. 54, § 31.]

Settlement final unless appealed from 32 O. S. 18. Sureties concluded by settlement, 44 O. S. 339. Their liability not affected by correction, 35 O. S. 550, see 6269n.

§ 6290. Foreign minors and guardians; their rights in this state. Sale of their lands. Additional security. Minors living out of this state and owning lands within the same shall be entitled to the benefit of this act; and guardians of minors residing out of this state, who have been appointed according to the laws of the state or territory where they may reside, shall have the right to bring and maintain actions and enforce the collection of judgments, rendered in such cases in their favor, in the same manner and to the same extent that they could do if they had been appointed under the laws of this state, upon giving security for the costs which may accrue in such actions, in the same way other non-residents are obliged to do under the laws of this state. All applications for the sale of real estate by guardians of minors who live out of this state shall be made in the county in which the land is situate; or, if situate in more counties than one, then in one of the counties in which a part of such real estate is situate; and additional security shall be required from such guardian or guardians, when deemed necessary, and such as may be approved by the probate court of the county in which such application is made. [55 v. 54, § 32.]

§ 6291. Settlement by executors, administrators, etc., of guardians. How enforced. When any guardian has died, or may hereafter die, or shall, by reason of insanity or other incompetency, be placed under guardianship. before the settlement in court of his or her guardianship account, it shall be the duty of the executor, administrator, or guardian, of such deceased or incompetent guardian to settle said account, in the same manner as such guardian ought to have done; and any person having an interest in the settlement of such account, or the court by which such guardian was appointed, of its own motion, may, by citation to be issued, returned, and proceeded upon according to the provisions of law which may then be in force for the settlement of decedent's estates, compel such settlement to be made by the administrator, executor, or guardian of such deceased or incompetent person as aforesaid. The executor, administrator, or guardian making such settlement shall be allowed such compensation for the same as the court with which the settlement is made shall deem reasonable. [84 v. 204; 55 v. 54, § 33.]

§ 6175. A 35 O. S. 550; 42 O. S. 549..

§ 6292. Effect of marriage of female guardian—her account and settlement. When any unmarried woman, who has been or may be appointed guardian of any minor, shall marry, such marriage shall of itself determine the guardianship of such woman; and the probate court of the proper county shall appoint another guardian for such minor, to which last named guardian all the estate of such minor shall, on demand, be delivered up by such former guardian; and she shall forthwith render her guardianship account for final settlement. [56 v. 88, § 34.]

19 Bull 106.

§ 6293. Wards may be bound out upon approval of probate court. The guardian of a female under twelve years of age or a male under fourteen years of age, may, if it be necessary, bind such minor to any suitable person, until such minor shall arrive at the age of twenty-one if a male or eighteen if a female, or for

a shorter period, but no such indenture shall be executed unless the probate court appointing such guardian shall first approve such binding and the terms and conditions of the indentures, and evidence such approval by a certificate under the seal of the court, indorsed upon the indentures. [56 v. 88, § 5.]

.See § 3118-3135.

§ 6294. **Release of wards tax title by guardian—effect of tender of deed.** When any minor has title to any real estate by tax title only, the guardian of such minor may, if he deem it advisable, by deed of release and quit claim convey such minor's interest or title to the person entitled to redeem such real estate, upon receiving from such person the full amount paid for such tax title with the penalty and interest allowed by law in that behalf; and if any such guardian shall tender such deed to the person so entitled to redeem such real estate, and such person shall refuse to accept the same and pay as aforesaid, such person in any proceeding thereafter instituted to redeem or recover such real estate shall not recover costs. [50 v. 265, § 1, 2.]

§ 6295. **Power of guardian to lease for three years.** A guardian of the person and estate, or of the estate only, of any minor may lease the real estate of his ward for any term not exceeding three years and not extending beyond the minority. [69 v. 65, § 14.]

18 Pa. St. 9; 58 N. Y. 185; 47 Am. Dec. 41; 15 Ill. 62, 33 *Id.* 212; 53 Pa. St. 500; 25 Wis. 646. Terminated on ward's attaining majority, etc., 16 Mass. 443; 6 Paige 390 or at his death, 46 N. Y. 594; 10 East. 494.

§ 6296. **Power to lease for fifteen years to save property from sale.** Such guardian may also lease the real estate of his ward for any term not exceeding fifteen years, although such term extend beyond the minority, whenever the court appointing him shall, on his application, find that such lease will be to the advantage of the ward, and is necessary to secure the improvement of the real estate and to increase its rents, and that such increase is needed for the support and education of his ward or to pay his liabilities or any liens on or claims against his estate, and that

by such lease a sale of real estate for these purposes may be prevented. [73 v. 207, § 1, 3.]

§ 6297. Petition for lease. Such application shall be by petition, which shall contain a description of the real estate and a particular statement of its value and the value of all other property or effects of the ward, and his income and expenses, a detailed statement of the improvements proposed and the liabilities or expense of support and education to be provided for, the rent of the real estate as it is, and the probable increase of rent if the improvements are made, the means intended to be used in making the improvements and the proposed terms and time of the lease; and such other facts as shall be pertinent to the question whether the authority for making the lease should be granted. [73 v. 207, § 2.]

§ 6298. Who may unite in application and proceedings thereon. In such application the guardian may act on behalf of two or more wards, and two or more guardians of different wards may unite, when all the wards are jointly or in common interested in the real estate, and the same rules shall apply as to parties and notice as in application for sale of real estate; and on the hearing the court shall appoint three disinterested freeholders of the county in which the real estate is situate, who are not of kin to the petitioner, to view the premises and report under oath their opinion of the probable cost of the improvements proposed, whether the same and the proposed lease would be for the best interest of the ward or wards, and if so upon what terms the lease should be made, and the report shall be returned on or before a day named in the order for the final hearing of the case. [73 v. 207, § 3, 5, 6.]

§ 6299. Hearing and orders thereon. On the final hearing, if the report of the freeholders be in favor of the lease, and the court be of opinion that it will be to the advantage of the ward or wards to improve and lease the real estate, and that such lease is necessary to secure the improvements and increase the rents, and that such increase is needed for the sup-

port and education of the ward or wards, or to pay his or their liabilities or liens or other claims against his or their estate, and that by such lease a sale of real estate for any of these purposes may be prevented, the court shall make an order authorizing the lease to be made on such terms and in such manner as the court shall think proper. [73 v. 207, § 4.]

§ 6300. **How improvements may be made.** In the lease made in pursuance of such order, it may be provided that the improvements shall be made by the tenant as part of the rent, or by the guardian, either out of the rent or other means of the ward or wards, as the court may have directed. [73 v. 207, § 1.]

§ 6301. **When lease extending beyond minority determines—Lien of tenant for improvements.** Any lease made by a guardian to extend beyond the minority shall, nevertheless, determine when the ward, if there be but one, arrives at full age, or if more than one, when all of them arrive at full age, unless such ward or wards then confirm the same; and in case of the death of the ward, if there be but one, or of all of them, if more than one, the lease shall also determine, unless the legal representatives of such ward or wards confirm the same; if there be more than one ward, and some, but not all die, the lease shall continue till the survivor or survivors reach full age; and when such lease is determined by reason of the death or majority of the ward or wards, the tenant shall have a lien on the premises for any sum or sums expended by him in pursuance of the lease in making improvements and for which compensation shall not have been made, either by the rent or otherwise. [73 v. 207, § 1.]

OF LUNATICS, IDIOTS AND IMBECILES.

§ 6302. **Guardian for idiot, imbecile and lunatic—Who is an imbecile.** The probate court, upon satisfactory proof that any person resident of the county, or having a legal settlement in any township thereof,

is an idiot, imbecile or lunatic, shall appoint a guardian for such person, which guardian shall, by virtue of such appointment, be the guardian of the minor children of his ward, unless the court shall appoint some other person as their guardian; an imbecile shall, in this chapter, be understood to mean a person who, not born idiotic, has become so. [53 v. 81, § 41, 43, 44; 69 v. 174, § 1; 36 v. 40, § 17.]

Appointment of guardian for an imbecile is only *prima facie* evidence of imbecility, 35 O. S. 587. Appointment may be for lunatic and minor, and that for lunatic continues and bonds-men liable, 36 O. S. 460. The due appointment by the probate court of a guardian for a person as an idiot, imbecile or lunatic is conclusive evidence of such person's incapacity to make or ratify a contract or do any act in derogation of his guardian's authority pending the guardianship; as to the ward's capacity to marry, to make a will or commit a crime the appointment is only *prima facie* evidence of incompetency, 19 Bull 64. No notice required on application for appointment of guardian for imbecile, 18 Bull 37. Omission of journal to show notice supplied by *nunc pro tunc* entry after term, *Id.* Appeal from order of probate overruling motion of imbecile ward to terminate guardianship; 19 Bull 424.

§ 6303. When wife may be appointed guardian—Liability of sureties. When any person having a wife shall be declared to be an idiot, imbecile, or lunatic, it shall be lawful for the probate judge to appoint the wife of such person his guardian, if it be made to appear to the satisfaction of the judge that she is competent to discharge the duties of such appointment, and any married woman appointed such guardian shall, in her said capacity, have power to enter into official bonds, and she and her sureties thereon shall be liable in the same manner, and to the same extent as though said bond was executed by a *femme sole*. [53 v. 81, § 42.]

§ 6304. Laws applicable to guardians of lunatics, idiots, imbeciles and their children; settlement of such guardians. All laws relating to guardians for minors and their wards, and all laws pointing out the duties, rights, and liabilities of such guardians and their sureties, in force for the time being, shall be applicable to guardians for idiots, imbeciles, and lunatics, and their children, except as otherwise specially provided; but in the settlement of the accounts of such

guardians, no voucher shall be received from or allowed as a credit to the guardian of any idiot, imbecile, or lunatic, which shall be signed or purport to be signed by such idiot, imbecile, or lunatic; and provided, that any settlement of the account of any such guardian heretofore made, in which any such receipt shall have been allowed as credit to such guardian, shall be held and deemed absolutely null and void, and any settlement made by any such guardian shall, at any time within two years after the appointment of another guardian, or after the disability of such ward may be removed, or such ward may die, be opened up and reviewed, on the motion of such newly appointed guardian, or legal representative, or of any other interested person, notice of which motion shall be given by publication or otherwise as the probate judge may direct. [65 v. 206, § 45.]

Liability of sureties, see 44 O. S. 178, § 6273*n*.

§ 6305. **Suit by guardian of idiot, imbecile or lunatic, and revivor of same.** Such guardian may sue in his own name, describing himself as guardian of the ward for whom he sues, and when his guardianship shall cease, by his death, removal, or otherwise, or by the decease of his ward, any suit, action, or proceeding then pending shall not abate, if the right survive, but his successor as guardian, or such idiot, imbecile, or lunatic, if he be restored to his reason or the executor or administrator of such idiot, imbecile, or lunatic as the case may require, shall be made party to the suit or other proceeding, in like manner as is or may be provided by law for making an executor or administrator party to a suit or proceeding of a like kind, where the plaintiff dies during its pendency. [53 v. 81, § 46.]

§ 6306. **Sale of real estate by guardian of idiot, imbecile or lunatic—Petition—Private sale—Wife party defendant.** Whenever the sale of the real estate of such ward is necessary for his support, or the support of his family, or the payment of his debts, or such sale will be for the interest of such ward, or his children, the guardian may sell the same under like proceed-

ings as are or may be required by law to authorize the sale of real estate by the guardian of a minor, or if it be more for the interest of such idiot, imbecile, or lunatic, or his children, the probate court, upon the petition of the guardian, may authorize him to sell said real estate at private sale, either in whole or in parcels, and upon such terms of payment as shall be prescribed by the court: Said petition shall contain a pertinent description of the real estate proposed to be sold, a statement of its value as nearly as can be ascertained, and the facts on which the application is founded, and if, upon hearing, the court shall be satisfied that it will be more for the interest of the ward that said real estate should be sold at private than at public sale, the court may make an order authorizing said sale, and prescribing the terms thereof, first taking from said guardian a sufficient bond for the faithful performance of his duty in the premises, and for accounting for the proceeds of all sales made under said order: provided, however, that the guardian shall not be authorized to sell the real estate at private sale for less than its full appraised value; and if the ward have a wife she shall be made a defendant to the petition, and if she file her answer consenting to the sale free and discharged of all right and expectancy of dower therein, such answer shall, on the sale being confirmed, be a full release of her expectancy of dower, and unless in such answer she waive any allowance in lieu of dower, the court, shall allow her out of the proceeds of the sale such sum in money as is the just and reasonable value of her expectancy of dower. [60 v. 76, § 47; 59 v. 55, § 1.]

§ 6307. Dower of idiotic, imbecile or insane widow, how assigned or sold by guardian. The guardian of any idiotic, imbecile, or insane widow, who has or is supposed to have a right of dower in any lands or tenements, of which her husband was seized as an estate of inheritance, or in any land held by bond, article, or other evidence of claim, where the dower has not been assigned, shall have power to sell, compromise, or adjust the same upon such terms as he shall deem for the interest of such widow, and as the probate

court of the county in which the guardian was appointed shall approve; and after such approval, the guardian may execute and deliver all needful deeds, releases, and agreements for the sale, compromise or assignment of such dower. [62 v. 102, §§ 1, 2, 3.]

§ 6308. **Guardian empowered to lease and improve estate — termination of lease — lien of tenant.** Such guardian may also, in like manner as the guardian of a minor, and on like proceedings, be authorized to lease and improve the real estate of his ward; and if the lease extend beyond the time of the restoration of such ward to sound mind, or his death, such lease shall determine on his restoration or death, unless the same be confirmed by such ward or his legal representatives; but if such lease determine by reason of the restoration of the ward or his death, the tenant shall have a lien on the premises for any sum or sums expended by him in pursuance of the lease in making improvements and for which compensation shall not have been made either by the rent or otherwise. [73 v. 207, §§ 1, 2, 3, 4, 5, 6.]

§ 6309. **Long lease by guardian may be authorized by court — lease for three years without order of court.** Such guardian may also be authorized by the probate court to lease the real estate of his ward or any part thereof for any limited term of years or by perpetual lease, with or without the privilege of purchase, whenever the court on his application shall find that the same is necessary for the support of his ward or the support of his family, or that such leasing will be for the best interests of him or them; but such guardian may lease the real estate of his ward for any term not exceeding three years without any application to the court. [64 v. 48, § 1.]

§ 6310. **Application for authority to make long lease.** The application for authority to make such long lease or leases shall be by petition, setting forth the character of the idiocy, imbecility, or lunacy of the ward, whether curable or incurable, temporary or confirmed, and its duration, the number, names, ages, and residence of the family of the ward, including the wife or

husband of the ward, and of those who have the next estate of inheritance from said ward, all of whom as well as the ward shall be made defendants; and the petition shall also contain a description of the real estate, its value, and the amount for which it can probably be leased, the reasons for the proposed lease, and the terms, covenants, conditions, and stipulations on which it is proposed to lease the same. [64 v. 48, §§ 1, 2, 3.]

§ 6311. **Proceedings on such application.** On filing the petition, the same proceedings shall be had as on petition for sale of the real estate of a minor, except that the appraisers shall appraise not only the value of the real estate, but also the value of its annual rent upon the terms, covenants, conditions and stipulations of the lease as proposed in the petition; and the appraisers shall also state in their report their opinion whether the proposed lease will be to the interests of the ward and his family, and they may also suggest any change in the terms, covenants, conditions and stipulations proposed in the petition; and on the return of the appraisement the guardian shall not be required to give an additional bond, but in case of sale under the terms of the lease, he shall be required to give such bond before the confirmation of the sale. [64 v. 48, § 1, 2.]

§ 6312. **Final hearing and orders.** Upon the final hearing, if the prayer of the petition be granted, the court may prescribe the terms, covenants, conditions, and stipulations of the lease, either in accordance with those set forth in the petition or otherwise, and authorizing the lease to be made by public or private letting, as may be deemed best; but in no case shall the leasing be allowed for a less rent than that named in the report of the appraisers, and the lease shall not take effect till the same, with the security therein, is approved and confirmed. [64 v. 48, § 2, 3.]

§ 6313. **Completion of real estate contract—Additional bond.** The guardian of an idiot, imbecile, or lunatic, whether appointed by a court in this state or elsewhere, may complete the real contracts of his ward,

or any authorized contract of a guardian who has died or been removed, in like manner and by like proceedings as the real contract of a decedent may, under an order of court, be specifically performed by his executor or administrator; but in all cases when the guardian, by virtue of such contract or the completion thereof, shall receive or be entitled to receive any moneys not amply covered by his bond, the court shall require of him an additional bond, with sureties, in respect of such moneys. [60 v. 76, § 48.]

§ 6314. **Insolvency of lunatics.** If the estate of the idiot, imbecile, or lunatic, is insolvent, or will probably be insolvent, the same shall be settled by the guardian in like manner, and like proceedings may be had as is or may be required by law for the settlement of the insolvent estate of a deceased person. [53 v. 81, § 49.]

§ 6315. **Foreign guardian of foreign idiot, imbecile or lunatic may dispose of property belonging to his ward.** The foreign guardian (conservator, trustee, or other person having power similar to those of guardians in this state), of a foreign idiot, imbecile, or lunatic, appointed in any other state of the United States, or any territory thereof, may possess, manage, or dispose of the real and personal estate of his ward, situate in this state, in like manner and with like authority as guardians of idiots, imbeciles, or lunatics appointed by the courts of this state, after complying with the following requirements: First—An authenticated copy of the foreign commission of idiocy or lunacy proved, allowed and recorded in the probate court of the county or one of the counties in which such estate is situate, in like manner as is or may be provided by law for the admission to record of an authenticated copy of a will made in any other of the United States. Second—Evidence satisfactory to the court here, before which such foreign commission is approved, that such idiocy or lunacy still continues. Third—The foreign guardian, conservator, trustee, or other person having powers similar to those of guardians in this state, shall file his bond, with sureties, residing in this state or else-

where, to the acceptance of the court, conditioned for the faithful administration of his guardianship. [62 v. 43, § 50.]

§ 6316. When guardianship to terminate. Whenever the probate judge shall be satisfied that an idiot, imbecile, or lunatic, or a person as to whom guardianship has been granted as such, is restored to reason, or that letters of guardianship have been improperly issued, he shall make an entry upon the journal that said guardianship terminate; and the guardianship shall thereupon cease and the accounts of the guardian shall be settled by the court. [53 v. 81, § 51.]

OF DRUNKARDS.

§ 6317. When guardian to be appointed for drunkard. The probate court upon satisfactory proof that any person resident of the county wherein the application may be made, is incapable of taking care of and preserving his or her property, by reason of intemperance or habitual drunkenness, shall forthwith appoint a guardian of the property of such person, which guardian shall, by virtue of such appointment, be guardian also of the minor child or children of his ward, in case no other be appointed; and all laws relating to guardians for lunatics, idiots, and imbeciles, and their wards, and all laws pointing out the qualifications, duties, rights, and liabilities of such guardians, and their sureties, in force for the time being, shall be applicable to the guardians contemplated by this title. [68 v. 6, § 1.]

Common pleas formerly could appoint, 29 O. S. 82. No right to a jury, *Id.* Guardian may employ lunatic's wife to act, 1 Bull 104.

§ 6318. Notice to be served on party, etc. Sale thereafter invalid. At least five, but not more than ten, days prior to the time when the application for the appointment of the guardian authorized by the foregoing section shall be made, a notice, in writing, setting forth the time and place of the hearing of the application, shall be served upon the person for whose property such appointment may be sought; and from the time of the service of such notice until the hearing, or the day thereof, as to all persons

having notice of such proceeding, no sale, gift, conveyance, or incumbrance, of the property of such intemperate person or habitual drunkard, shall be valid. [68 v. 6, § 2.]

§ 6319. When guardianship shall terminate. The court upon reasonable notice to such guardian, and to the person or persons on whose application the appointment was made, and satisfactory proof that the necessity for such guardian no longer exists, shall order that the relation of guardian and ward terminate, and that the ward be restored to the full control of his property, as before the appointment. [68 v. 6, § 3.]

TRUSTEES FOR NON-RESIDENTS.

§ 6320. How trustees are appointed for non-residents. When any minor, idiot, lunatic, or imbecile, residing out of this state, has any real estate, goods, chattels, rights, credits, moneys, or effects in this state, the probate court of the county where such property or any part of it may be situate, shall have power, whenever it considers it necessary, to appoint a trustee of such minor, idiot, lunatic, or imbecile, to manage, collect, lease, and take care of such property. [72 v. 161, § 1.]

§ 6321. Jurisdiction. The appointment of a trustee, first lawfully made, shall extend to all the property and effects of the minor, idiot, lunatic, or imbecile in this state, and shall exclude the jurisdiction of the probate court of any other county. [72 v. 161, § 2.]

§ 6322. Bond and duties. The trustee shall give bond, payable to the state of Ohio, with such sureties and in such sum as shall be approved by the court, not less than double the value of all the property that will probably come into his hands, and shall take upon himself the care and management of the estate and property of such minor, idiot, lunatic, or imbecile, situate in this state, and the collection of debts and other demands due such minor, idiot, lunatic, or imbecile, from persons residing or being in this state, and shall settle with the court, and be liable to suit

or removal for neglect or misconduct in the performance of his duties, in like manner as is or may be provided by law in respect to guardians of minors, and as is or may be provided by law for the settlement of the accounts of trustees. [72 v. 161, § 3.]

§ 6323. Trustee may lease or sell real estate as guardian of minor. The trustee may lease or sell the real estate of such minor, idiot, lunatic, or imbecile, under the same rules and limitations as are now or may be provided by law for the sale of real estate by guardians of minors in this state. [72 v. 161, § 4.]

§ 6324. How long trustee to hold office. The said trustee shall, unless removed by the court, hold his appointment until such minor arrives at the age of majority, whether such minor be under twelve or fourteen years of age or not at the time of such appointment, or until the disability of such idiot, lunatic, or imbecile shall be removed, or the minor, idiot, imbecile, or lunatic die. [72 v. 161, § 5.]

§ 6325. When and to whom trustee shall pay over money. All moneys due to such minor, idiot, lunatic, or imbecile, in the hands of such trustee, shall, during the minority of such minor, or during the disability of such idiot, lunatic, or imbecile, be paid over to the foreign guardian of such minor, idiot, lunatic, or imbecile, so far as necessary or proper for his support and maintenance, or in case of the decease of such minor, or of such idiot, lunatic, or imbecile, to the administrator or other legal representative of such minor, idiot, lunatic, or imbecile: provided, that the court which appointed such trustee shall have satisfactory proof, as hereinafter provided, of the authority of such guardian, or administrator, or other legal representative, to receive the moneys or estates of such minor, idiot, lunatic, or imbecile, and that the security given by such guardian, or administrator, or other legal representative, is sufficient to protect the interest of such minor, idiot, lunatic, or imbecile, or his or her estate, and shall moreover deem it best for the minor, idiot, lunatic, or imbecile, or his or her estate. [72 v. 161, § 6.]

§ 6326. **How foreign guardian, etc., may collect money.** When any foreign guardian, administrator, or other legal representative of such minor, idiot, lunatic, or imbecile, shall apply to have all or any of the moneys or property in the hands of such trustee paid or delivered over to him, he shall file his petition, or motion, to that effect, in the court by which such trustee was appointed, giving such trustee thirty days' notice of the time of hearing thereon, and he shall also produce an exemplification from under the seal of the office (if there be a seal) of the proper court of the state of his residence, containing all the entries on record in relation to his appointment, giving bond, etc., and authenticated as required by the act of congress in such cases; and upon the hearing thereof, the court shall make such order, as, under all the circumstances, it shall deem for the best interests of such minor, idiot, lunatic, or imbecile, or his or her estate. [72 v. 161, § 7.]

§ 6327. **Trustee may loan money in certain case** When any money of such minor, idiot, lunatic, or imbecile may be in the hands of such trustee, and not likely to be needed for the support and education of such minor, idiot, lunatic, or imbecile, said trustee shall loan the same in the same manner as guardians by the laws of this state are required to loan the moneys of their wards. [72 v. 161, § 8.]

TRUSTEES GENERALLY, AND THEIR ACCOUNTING.

§ 6328. **Trustees must render biennial account.** Any trustee of any non-resident idiot, imbecile, or lunatic, appointed as aforesaid, and any trustee heretofore or hereafter created by any last will or deed, or appointed by any competent authority, to execute any trust created by any such last will or deed, shall, as often as once each two years, render an account of the execution of his said trust, to the probate court of the county in which he was appointed, or in which such last will or deed may be recorded, in the manner provided by law for the settlement of the accounts of executors and administrators: provided, this section shall not apply in

any case in which the will or deed creating such trust designates any other tribunal for the settlement of the trust, or in which any other tribunal shall have acquired jurisdiction. [70 v. 100, § 1.]

§ 6329. Citations and notices. The probate court shall issue and have served in the same manner as is or may be provided by law, in the case of the settlement of executors and administrators, the necessary citations and notices by publication or otherwise, requiring all persons interested, to attend such settlement and make objections thereto, if any they have. [70 v. 100, § 2.]

§ 6330. Probate court to determine as to execution of trust. The said court shall have full power to hear and determine all matters relative to the manner in which the trustee has executed his said trust, and as to the correctness of his accounts rendered as aforesaid; and to require any trustee, created as aforesaid within such county, on the determination of his said trust, or on the removal or resignation of such trustee, or in case of the death of the trustee, to require his executor or administrator to render a final account of the manner in which he has executed his said trust, and to hear and determine all matters relating thereto, in the same manner as the accounts of executors and administrators are required by law to be settled. [70 v. 100, § 3.]

§ 6331. Appeal from determination of probate court. The determination of the probate court on any such settlement, whether final or intermediate, may be appealed from in the manner provided for an appeal from said court on the settlement of the accounts of executors and administrators, and the like proceedings shall be had on such appeal, and the result of such proceedings on appeal certified back to the probate court. [70 v. 100, § 4.]

§ 6332. Force and effect of determination. The determination of the probate court on any such settlement, shall have the same force and effect as the like determination as to the account of an administrator

or executor; and when an account is settled in the absence of any person adversely interested, and without actual notice to him, the account may be opened on his filing exceptions to the account, at any time within eight months thereafter; and upon any settlement of an account by a trustee, all his former accounts may be so far opened as to correct any mistake or error therein, excepting that any matter of dispute between two parties, which had been previously heard and determined by the court, shall not be again brought in question by either of the same parties without leave of the court. [70 v. 100, § 5.]

16 Bull 69. The sureties of a guardian may on their own motion become parties to the settlement of final account for the purpose of correcting errors in that or a former account, *Id.*

§ 6333. Allowance of compensation. The probate court shall have power to make such allowance as compensation to trustees for their services and expenses in executing their trusts, as the court may deem just and equitable, not exceeding the compensation allowed to guardians for like services; and said judge shall have the same fees as in the settlements of administrators and executors. [70 v. 100, § 6.]

§ 6334. When court may accept resignation of trustee or remove him. The probate court may accept the resignation of any trustee accounting therein, or who has been appointed thereby, or may remove any such trustee for any cause for which the guardian of a minor may be removed, or because the interest of the trust requires such removal; and when the minor for whom the trustee was appointed, has since the appointment, become a resident of the state and for whom a resident guardian has been appointed, the probate court shall remove such trustee and require an immediate settlement of his account, and upon the resignation, removal or death of any such trustee, the probate court may appoint a successor, who shall give bond in the same manner and with like conditions as required by law of guardians of minors. [81 v. 134; 80 v. 43; 78 v. 44.]

Power of probate court, to fill vacancies caused by death, etc. 39 O. S. 29; resignation of trustee in default, 40 O. S. 400.

Appointment by courts of record of trustees to manage funds of unknown or non-resident parties. Whenever in any action or proceeding pending in any court of record, it shall be made to appear to such court, that any person or persons, entitled to all or any part of the proceeds of property sold in such action or proceeding, is or are unknown or non-residents of this state, and not represented in such action or proceeding, or if it be so made to appear that the person or persons so entitled, can not at the time be definitely ascertained or determined, the court may appoint a trustee to receive, hold and manage such proceeds or such part thereof, and to whom the notes and mortgage for the unpaid part thereof shall be made, delivered and paid. [84 v. 232.]

Id. Bond required—duties—subject to order of court—report—payment—removal—compensation. Such trustee shall before entering upon his duties give bond to the State of Ohio, in a sum one and one-half times the amount to be received by him, conditioned as the court may order, and with surety to be approved by the clerk of such court; and it shall be the duty of such trustee to collect, by action or otherwise, the unpaid part of such proceeds, and to invest, re-invest and manage such fund for the best interest thereof, making only such investments and upon like securities as guardians are by law authorized to make; such trustee shall, at all times, be subject to the order of the court, and shall, when required by the court, report to it his proceedings and the amount and condition of the fund. He shall pay over such fund only upon the order of the court appointing him; he may at any time be removed by the court, and he shall receive only such compensation as the court may allow, to be paid out of such fund. [84 v 232.]

Id. Application of the act. Effect of payment to trustee. The provisions of this act shall apply to actions and proceedings now pending, as well as to those hereafter commenced; such payment to such trustee shall be a bar to any claim thereafter made by any person whomsoever; and the person or per-

sons, or corporations, so paying, shall, in no case be required to see to the application of the money so paid. [84 v. 232.]

CHAPTER IV.

INSOLVENT DEBTORS.

VOLUNTARY ASSIGNMENTS.

§ 6335. Assignee must give bond in Probate Court. Additional bond. When assignment to take effect. When any person, partnership, association, or corporation, shall make an assignment to a trustee of any property, money, rights, or credits, in trust for the benefit of creditors, it shall be the duty of said assignee, within ten days after the delivery of the assignment to him, and before disposing of any property so assigned, to appear before the probate judge of the county in which the assignor resided at the time of executing the said assignment, produce the original assignment, or a copy thereof, cause the same to be filed in the probate court. and enter into a bond, payable to the state, in such sum and with such sureties as shall be approved by the court, conditioned for the faithful performance, by said assignee, of his duties according to law; and the court may require the assignee, or any trustee subsequently appointed, to execute an additional undertaking whenever the interests of the creditors of the assignor demand the same; any such assignment shall take effect only from the time of its delivery to the probate judge, and the exact time of such delivery shall be indorsed thereon by the probate judge, who shall immediately note the filing on the journal of the court; and it may be delivered by the assignor to the probate judge either before or after its delivery to the assignee. [57 v. 39, § 1; 56 v. 231, § 18.]

Deed of Assignment.—Know all men by these presents, that whereas I, A. B., of the city of —, county of —, and State of Ohio, being indebted to divers persons in varied sums of money, which I am now unable to pay in full and whereas I am desirous to convey all my property for the benefit of creditors without any preference or priority. Now therefore, I, the said A. B., in consideration of the premises and of one dollar to me paid by C. D., the receipt of which is hereby acknowledged, have granted, bargained, sold, assigned, transferred and set over, and by these presents do grant, bargain, sell, assign, transfer and set over unto said C. D. all and singular the lands, tenements, hereditaments and appurtenances, goods, chattels, stocks, promissory notes, debts, choses in action, evidences of debt, claims, demands, property and effects of every description belonging to me, wherever the same may be situated, except such property as is by law exempt from execution; to have and to hold the same unto the said C. D. in trust to sell and dispose of the said real and personal property and to collect, sue for and demand, receive and recover all such sums of money as may be or become due, and payable on said promissory notes, debts, choses in action, evidences of debt, claims and demands, and then in trust to apply the proceeds from the same as follows:

First—To pay the lawful costs and expenses of executing the trust hereby created, including reasonable attorney's fees for legal advice in regard to the formation of the trust, and for drawing this deed of trust.

Second—To pay each and all creditors the full sums that may be due and owing to them from me; provided, however, that if there shall not be sufficient funds with which to pay all said debts, then the said debts are to be paid ratably and in proportion.

Third—If the proceeds as aforesaid shall be more than sufficient to pay and satisfy every one of my creditors, then to pay and return to me the balance that may be left, if any, after paying all my creditors as aforesaid.

And I do hereby nominate, constitute and appoint the said C. D. my true and lawful attorney, irrevocable in my name or otherwise, for the purpose aforesaid, to execute the trust hereby created; giving and granting unto my said attorney full power and authority to do and perform every act, deed and thing requisite and necessary in the premises, as fully to all intents and purposes, as I might or could do if this assignment had not been made; with full power of substitution and revocation, hereby satisfying and confirming all my said attorney or his substitute may lawfully do or cause to be done in the premises by virtue hereof.

In witness whereof, I have hereunto set my hand this — day of —, in the year one thousand eight hundred and eighty-eight.

A. B.

Signed and acknowledged in presence of

State of Ohio, — county, ss: Be it remembered that on the — day of —. 1888, before me, the subscriber, a notary public in and for said county, personally came A. B., the grantor in the foregoing deed, and acknowledged the signing

thereof to be his voluntary act and deed for the uses and purposes therein mentioned.

In testimony whereof, I have hereunto subscribed my name and affixed my notarial seal on the — day of —, 1888.

E. F.,

Notary Public in and for — county, Ohio.

Acceptance.—I hereby accept the trust created by the above instrument and agree to faithfully perform the same.

— day of —, 1888.

C. D.

Deed of assignment by partners.—Know all men by these presents, that A. B. and C. D., partners as A. B. & Co., in the — business, at —, in consideration of one dollar to them paid by E. F., of the same place, the receipt of which is hereby acknowledged, and other considerations, do hereby sell and convey unto the said E. F., his successors and assigns, all of the property and assets of said partnership of whatever nature or kind and wherever situated, consisting principally of the stock in trade of said partnership, situated in the above mentioned premises, the book accounts, and bills receivable of said business, etc., to have and hold said property and assets subject to certain chattel mortgages filed this day to the use of the said E. F., his successor and assigns, in trust for the following uses and purposes, to-wit: To convert the said property and assets into money and distribute the same under and in accordance with the laws of the State of Ohio, governing the administration of the estates of insolvent debtors and the order of the Probate court of — county, Ohio.

In witness whereof we have hereunto set our hands this — day of —, 188—,

Signed in the presence of

Deed of assignment.—Whereas I, George E. House, of Mount Gilead, Morrow county, Ohio, having been engaged in the mercantile business in said town, and being unable to meet the payment of my claims as they fall due, and being desirous that all my creditors shall share equally, in proportion to their several claims, in the proceeds of my property, do therefore hereby sell, convey and assign to Smith Thomas, for the benefit of my creditors, the following real estate [*Here follows a description of the real estate conveyed.*] To have and to hold and dispose of the same in the manner prescribed by the statute regulating assignments for the benefit of creditors subject to all incumbrances, now on said premises and reserving to the said George E. House, his right of homestead under the statute in said premises. And I, the said George E. House, do hereby sell and assign to the said Smith Thomas, for the benefit of my creditors as aforesaid, all my personal property, notes and book accounts, excepting from this assignment such property as I may hold [exempt] from execution lawfully.

This form was held good in 16 O. S. 434.

Bond.—Whereas by a certain deed of assignment executed by A. B., of — county, State of Ohio, to C. D., on the — day of —, in the year of our Lord one thousand eight hundred and eighty —, the said C. D. was appointed assignee for the benefit of creditors [or trustee] of A. B., for the pur-

poses therein expressed. Now therefore, we, C. D., E. F. and G. H., undertake and bind ourselves unto the State of Ohio in the sum of ——— dollars that the said C. D. will faithfully perform all his duties as such assignee [or trustee] according to law.

Witness our hand, this ——— day of ———, A. D. 188—.

Signed in presence of

Notes.—*Acceptance* of assignment presumed, 9 Bull 350. Refusal to accept does not re-vest property in assignee, 6 Gratt 174; 13 B. Mon. 560. After acceptance trust can not be renounced without consent of parties interested, Burrill on Assignments, § 269. See 1 H. 369.

Acknowledgement of deed of assignment necessary to convey real estate, 40 O. S. 109.

Appeal.—§ 6407.

Assent of creditors not necessary to validity of assignment, 12 O. S. 591.

Assignee in this state not only represents the assignor but the creditors, 11 Bull 283; 25 O. S. 549.

Attachment.—Insolvent changing business into corporation without fraudulent intent, not ground for, 11 Bull 272.

Bank deposit equitably belonging to bank does not pass by assignment, 39 O. S. 600. Drawing and delivery of check on fund in bank, an equitable assignment *pro tanto* and holder may recover in full though drawer assigns before presentation and acceptance, 1 C. C. R. 1. Payment of ante dated check by bank having knowledge of assignment no defense to action by assignee, 40 O. S. 1.

Bankruptcy.—Discharge in, does not affect rights of creditors under assignment made long prior to the "Bankrupt Act," 12 Bull 286.

Collusive assignment.—Rights of creditors under. A creditor of two insolvent debtors who proves his claim and takes his dividend against one, loses his right to proceed against the other for the unpaid balance, but no creditor of both debtors by taking judgment against one, loses his right to his *pro rata* dividends in the proceeds of the property of both, 41 O. S. 187.

Contribution.—Where a member of an insolvent corporation voluntarily pays the debts of the corporation, he can not recover from another member who was at the time of such payment solvent and within the same jurisdiction, his *pro rata* share of his indebtedness, 3 C. C. R. 1.

Corporation.—May assign, 3 Barb. Ch. 119, 124; and an assignment does not work a dissolution, 21 Barb. 221, 224; 92 Pa. St. 396. Banking company can not assign preferring creditors, § 7644. Judgment against stockholders of insolvent corporation final as to creditors, 39 O. S. 543. Stockholders, liability; when statute of limitations begins to run, 15 Bull 164; 40 O. S. 507. Stockholders, individual liability, see cases collected in 3 C. C. R. 1, 4.

Description.—Defective will not defeat assignment. 2 Sandf. S. C. 143; 7 Ala. 873; cured by schedule, 16 Pick. 247. See 22 Kas. 106; 9 Neb. 40; 15 Conn. 152; nor omission to annex schedule, 7 Pet. 608, 614; 6 Mass. 339; 1 Edw. Ch. 256, 264. Mistake in amount of debt corrected, 5 S. & R. 401; 2 Met. 105; 3 Ired. Eq. N. C. 178; but not so as to prejudice rights of other

creditors, 4 J. J. Marsh. 458, 465; intentional omission of property in schedule when held not to vitiate, 15 Bull 372.

Distribution.—Only on allowed claims, 32 O. S. 590. Assignee bound by court's distribution, 37 O. S. 222; must be according to law of domicil, 31 O. S. 611.

Foreign assignment.—Does not affect real estate in Ohio, 2 O. 234; 3 O. 488. Foreign assignment of Ohio land superior to subsequent foreign attachment, 9 O. 180; see 17 Bull 174. Foreign assignment of personalty superior to subsequently matured cross-demand held by Ohio debtor, 27 O. S. 355; or subsequent attachment of Ohio debtor, 9 Bull 350; when the assignment is valid where made, *Id.*; 31 O. S. 61; and not invalid according to the laws of the state where the property is, see 142 Mass. 53; 13 Bull 85; and generally, 38 How. Pr. 59; 34 Barb. 517; 6 Wall 307; 7 *Id.* 139; 96 N. Y. 248; 93 *Id.* 82; 71 Me. 514; 32 Vt. 442, 460; 83 Mo. 366; 15 Bull 394. Deed of assignment takes effect when mailed, 31 O. S. 611. Powers of foreign assignee, 14 Bull 325.

Husband and wife.—Taking title in name of, not within meaning of, § 6344; (before revision) 34 O. S. 645; Cf. 42 O. S. 168, 171. See *mortgage, sale, infra*. Whether married woman can make an assignment, 14 Bull 197.

Insurance.—Before bond of assignee filed, 14 Bull 285. Insolvency of insurance company excuses insured from paying subsequent premiums, 14 Bull 205.

Liens.—Assignee takes subject to, 38 O. S. 610. Assignment does not affect priority of, 28 O. S. 63; 40 O. S. 109. Judgment can not attach after assignment, 14 O. S. 200. See 45 O. S. 325; 18 Bull 316. Deed of assignment excepting "all existing liens" does not give priority to mortgage lien void as to creditors, though valid as to assignor, 42 O. S. 295.

Limitation.—See § 6344, 6352 notes. Of action on assignee's bond, ten years § 4984. Payment of dividend not a new promise under limitation act, 16 O. S. 566; payment on account good answer to plea of statute, 12 Bull 144. The statute of limitation does not run in favor of an assignee, 12 Bull 286.

Mortgage.—Void as to creditors, void as to assignee, 25 O. S. 549; 42 O. S. 295; see 11 Bull 283. Rights of assignee superior to invalid mortgage, 8 O. S. 5; and to prior unrecorded mortgage, 2 C. C. R. 485; but not to prior valid mortgage, 20 O. 390; though given to particular creditors on same day as assignment if filed first, 15 Bull 8; nor to deed intended as a mortgage though not a legal one, and though filed after deed of assignment, 44 O. S. 210; nor to mortgage to trustee to secure *bona fide* indebtedness to wife, 40 O. S. 287; or to infant, 17 Bull 64. Assignee can not prevent foreclosure of assignors' mortgage, 31 O. S. 158; but can sell property free from chattel mortgage, 36 O. S. 1; 37 O. S. 218.

Parties.—Creditors not necessary parties in action against assignee, 29 O. S. 441. See § 6344 *n.*

Partnership.—A partner can not make an assignment for the firm, unless the others consent, 1 D. 239; 29 O. S. 441; but sole surviving insolvent partner can, 15 Bull 372; S. C. 118 U. S. 3. Ratification of assignment by partners relates back to date of assignment, 29 O. S. 441; but not so as to defeat intervening rights, *Id.* Where there are joint and separate assets

and joint and separate debts, the joint assets must first be applied to the payment of joint debts, and the individual assets to the payment of individual debts. If there be any surplus in either of the funds after the payment of that fund, the creditors of the other will share equally in the distribution of the surplus, 7 O. S. 179; but assignment of individual members after dissolution defeats firm creditors' preference in respect of firm assets. Both classes of creditors must then share equally, 5 O. S. 508. Assignment by insolvent firm works dissolution, 6 W. & S. 238; or by one partner of his interest in the firm to the other partners, 13 Pa. St. 617. Assignment by limited partnership preferring creditors void as against partnership creditors, § 3156; by partners one of whom is an infant void, 21 How. (N. Y.) Pr. 384. *Semble*, that partnership assignment not invalid because individual property not assigned, 15 Bull 10. Where there are no co-partnership funds and no solvent partner, the joint-creditors may come upon the separate estate of a partner *pro rata* with the separate creditors, 17 Bull 171.

Possession.—Assignee should take possession of the property at once, Burrill on Assignments, § 369. Actual possession not necessary to vest title in assignee, 81 O. S. 611. Delivery of keys of place where goods stored held sufficient, 50 N. Y. 352. Possession by assignor *prima facie* but not conclusive evidence of fraud, 9 O. 153; 3 *Id.* 527; W. 190. Assignee may employ assignor as agent to assist him, 4 Sandf. S. C. 252, 272; S. C. 6 N. Y. 510; 10 N. Y. 591; 24 How. Pr. 94. Acceptance of assignment does not bind assignor for payment of rent of premises leased by debtor, 1 Miles (Pa.) 358; but if he elects to take and enters into possession he becomes bound, 27 Ala. 630, 633.

Release.—Assignment containing stipulation for release as condition for receiving benefit or preference thereunder invalid, 5 O. 178; W. 606, 701; 14 Johns. 458; 11 Wend. 187; 37 N. Y. 135; 38 N. Y. 9.

Replevin.—Assignment after commencement of action but before service of order of delivery does not defeat, 33 O. S. 523. Liability of sureties on replevin bond in action revived in name of successor of assignee, 41 O. S. 591.

Reservations.—An assignment containing a stipulation reserving any benefit or advantage to the debtor at the expense of creditors is invalid, 5 Cow. 547; 18 S. & M. 22, 27; 18 Ala. 734; 737; 2 Pick. 129; 6 Gratt. 444; 5 Kas. 324, reserving any part of his property in trust for himself, 5 Cow. 547; 6 Hill 438; 15 N. Y. 208, giving assignor right to retain temporarily possession of assigned property, 10 Ala. 231; 26 *Id.* 172; 71 Mo. 30; 12 N. J. Eq. 214; 13 Pa. St. 579 *contra*; 1 Gratt 274; 9 Pick 21; 22 Ala. 238, reserving to assignor the power of making leases, 3 Md. 11, or reserving to him a control over the sale of the real estate, 26 Gratt. 563, or the power to appoint new assignees, 2 Johns. Ch. 565 or name an assignee's successor, 3 Barb. Ch. 644, have been held objectionable, but provisions reserving right of trustees to employ debtor to manage the property temporarily have been upheld, 20 L. J. C. P. N. S. 217; 7 Ala. 765; 10 *Id.* 92; 3 Cold. (Tenn.) 284, or excepting from the operation of the conveyance a certain portion of the property for the use of the debtor, 8 Gratt. 457; 4 Wheat. 399; 9 N. Y. 520, or reserving surplus to assignor after payment of debts of *all* creditors, 15 N. Y. 120; 16 Mo. 596; 54 Pa. St. 465; 17 Vt. 310, of partnership, 9 Paige 297,

802 (unless payment of individual debts is not provided for, 16 N. Y. 484,) or the payment of the debts of such of the creditors as are provided for in the assignment, 9 O. S. 546 (act 1853, not void but inures to benefit of all) or reserving surplus to assignor on condition of creditors releasing debtor, 3 Watts 198; 8 Leigh 271; 32 Minn. 60, though the weight of authority is to the contrary, 4 Dall. 76; 1 Head. 34; 14 Ind. 126; 40 Md. 414; 20 S. C. 416; 12 Ala. 101. Deed reserving fee of draughtsman held void under Maryland statute, 14 Bull 340.

Rights of assignee no greater than those of assignor, 33 O. S. 63, but see, 36 O. S. 11, 16; 37 *Id.* 218.

Sale.—No relief against mistakes, 41 O. S. 70, see 10 Bull 49. Dower not extinguished by, 31 O. S. 158. Power of court to fix price after three returns of no sale, 40 O. S. 830. Express power to sell on credit held not to defeat assignment, 6 O. S. 611 (1856). Assignee can not purchase, see 11 O. S. 57; 14 *Id.* 228. Action to set aside fraudulent in order to effect better sale of property levied on, 29 O. S. 597. Fraud of stockholder of insolvent corporation will not affect sale by assignee in good faith, 31 O. S. 60. See § 6350.

Set-off.—Claims acquired after assignment can not be set-off against assignee, 22 N. Y. 489. Creditor can not set-off his demand against value of articles purchased by him at assignee's sale, 1 Halst. 104. Set-off of claims not due, see 34 O. S. 381. Joint may be set-off against single debts in cases of insolvency, 41 O. S. 403. See generally § 5075 *n.*, Code of Civil Procedure.

Surety, see Replevin, *supra*; of insolvent administrator not liable for debt due from administrator to estate, 41 O. S. 588; 16 Bull 392.

Time of taking effect.—On delivery of deed to probate judge, § 6335, of foreign assignment when mailed, 31 O. S. 611.

Usury.—Assignee can not set up, if assignor could not, 3 Bull 557. Beneficiaries can set up, 14 O. S. 200.

What property passes.—Rights of action for damages pass by the assignment, 18 Conn. 522, and unpaid stock subscriptions, 10 Mo. App. 499; 570; 574, and insurance policies, 140 Mass. 169; 8 Wheat. 268, book accounts, 4 Mass. 508, 511, right to use a trade mark, 134 Mass. 247, contingent interests and expectancies, 2 Story 630. Judgments and executions, 93 N. Y. 374; 15 Mass. 481, bank deposits, 47 N. Y. Super. Ct. 322; 4 Sandf. S. C. 604; 9 N. Y. 211; assignor's interest in wife's property, 1 Green Ch. 513, membership in N. Y. Produce Exchange, 9 Bull 376; 10 Bull 163 *contra Id.*, but claims for personal torts do not, 18 Pa. St. 249. "Where purchases are made by a firm some time before an assignment, but arrive subsequently, the title thereto vests in the assignee, the seller having failed to exercise the right of stoppage *in transitu*; but property the title to which is acquired subsequent to the assignment does not pass." Burrill on Assignments § 112, citing, 22 Pa. St. 427; 13 O. S. 210; 41 Mich. 675; 87 Pa. Sts. 228.

What constitutes an assignment.—A creditor received securities from an insolvent debtor in trust, to be sold, and out of the proceeds to pay her own claim and the claims of certain other creditors, held an assignment for the benefit of creditors, 19 Bull, 180 citing, 4 O. S. 45.

Miscellaneous.—Provisions in deed empowering assignee to effect insurance on property, 11 Barb. 198, employ agents, 37 N.

Y. 608; 8 Dana 247, pay rents and taxes on real estate, 28 How. Pr. 333, or interest on mortgaged premises, 11 Barb. 198 upheld; and provisions exempting assignee from liability for acts of agents, 18 Gratt. 387; 18 Barb. 549, but not for acts of assignor's agents, 1 Sandf. Ch. 4, 6, nor for his own acts, 44 N. H. 48; 33 Ill. 334; 37 Barb. 621, see 49 Conn. 282.

§ 6336. On failure to file assignment or give bond, court to appoint a trustee. If any such assignment or a copy thereof shall, for ten days after the execution of the assignment, not be filed in the probate court as aforesaid, or if the assignee named thereon fail for that time to give bond as aforesaid, the court shall, on the application of the assignor, or of any one of his creditors, make an order removing such assignee and appoint a trustee in his place; provided, that if more than one assignee be named in the assignment, and some of them fail as aforesaid, the court may permit the assignee or assignees complying with the preceding section to qualify and enter upon the discharge of the duties of the trust. [71 v. 74, § 2; 74 v. 110. § 4.]

§ 6337. Resignation of assignee—appointment of trustee—filling vacancy—additional trustees. Any assignee who has qualified, and any trustee appointed by the court who has qualified, may, with the consent of the court, resign his trust; and in case of the death, removal, or resignation of a sole assignee or trustee, the court shall appoint one or more trustees in his place; but if there be one or more assignees or trustees who have not died, resigned, or been removed, the court may either fill the vacancy caused by the death, resignation, or removal, or allow the remaining assignee or assignees, trustee or trustees, to execute the trust, as the court may deem best for the trust; and the court may at any time, on application of a majority of the creditors in amount, appoint an additional trustee. [71 v. 101, § 1, 3, 4.]

§ 6338. Election of trustee by creditors. Whenever a petition shall be filed with the court, signed by creditors of the assignor who own not less than one thousand dollars of debts against the assignor, and the validity of such debts is shown by the schedule of debts on file in the court, or otherwise estab-

lished to the satisfaction of the court, praying for permission to elect a trustee or trustees, the court shall, by its order, fix a time for such election, and cause notices to be sent by mail or otherwise to each of the creditors of the assignor, specifying the time when the creditors shall meet at the court room for the election of a trustee or trustees; and at the time named, in such order, if creditors representing fifty per cent. or more of the debts of the assignor are present in person or by attorney, they may proceed to the election of a trustee or trustees, a majority in value of all the debts so represented at such meeting being necessary to a choice; and the proceedings of the meeting showing what creditors were present as aforesaid, and the amount of the debts held by them respectively, and who cast their several votes, shall be made out and signed by the president and secretary of the meeting and filed with the court; and if the court approve the choice, and the trustee or trustees so elected appear within ten days thereafter and give bond, the court shall appoint him or them as such trustee or trustees, and remove the preceding assignee or trustee: provided, that the summary determination of the court as to who are creditors and the amount of their claims in this section provided, shall have no effect as to the validity of such claims, except for the purpose of such election. [71 v. 73, § 14.]

§ 6339. Removal of assignee, etc., by the court—Effect of new bond. The court may remove any assignee or trustee, specifying in the order the cause of removal; and on application made by any surety or sureties of any assignee or trustee, the court may, if satisfied of the reasonableness of the application, require such assignee or trustee to give a new bond, or on failure so to do, the court shall remove such assignee or trustee; and upon a new bond being given in accordance with such order and approved by the court, the sureties in the original bond shall be by the order of the court discharged from further liability. [71 v. 73, § 14.]

§ 6340. Trustee appointed, to give bond—His rights on giving bond. Whenever the probate court appoints a trustee, whether in place of an assignee, or of a trustee before appointed by the court, such trustee shall, within ten days after his appointment, give bond as aforesaid, or, failing so to do, he may be considered as declining the appointment, and the place may be filled by the court; and when a trustee shall have given bond, he shall succeed to all the rights, powers and privileges of the preceding assignee or trustee; and the court may make and enforce all orders necessary to put the newly appointed trustee into possession of all property, moneys, books, papers, evidences of title, and other effects covered by the assignment, or in any way belonging to the trust; and such trustee may, by suit in the court of common pleas, or otherwise, compel the delivery to him of all such property, moneys, books, papers, evidences of title, and other effects. [71 v. 74, § 2; 71, v. 73, § 14; 73 v. 101, § 4.]

§ 6341. Settlement on resignation, removal, or death. How enforced. On the resignation or removal of an assignee, or trustee appointed by the court, such assignee or trustee shall forthwith file and settle his account, and on the death of any such assignee or trustee, his legal representative shall forthwith file and settle such account; and immediately after such settlement such assignee, or trustee, or his legal representative shall pay over to his successor, all moneys found due from him to the trust; and on failure so to do, or on failure to file and settle such account, or deliver over to his successor all property, moneys, books, evidences of title, papers, and other effects in any way belonging to the trust, such successor may, by action in the common pleas or otherwise, proceed on his bond against such assignee, or trustee, or his legal representative and the sureties in such bond. [71 v. 74, § 2; 73 v. 101, § 4.]

86 O. S. 458; 41 O. S. 591. The action may be brought in the superior court, 1 C. C. R. 20. Power of court to settle account though not formally refiled after resignation of assignee, 1 C. C. R. 550.

§ 6342. **Title to be conveyed to trustee.** Whenever the court appoints a trustee to act in place of the assignee of the debtor, the assignee and the debtor shall forthwith convey to such trustee the title to all the real estate embraced in the assignment. [68 v. 41, § 2.]

§ 6343. **Assignments in contemplation of insolvency to inure to benefit of all creditors.** All assignments in trust to a trustee or trustees, made in contemplation of insolvency, with the intent to prefer one or more creditors, shall inure to the equal benefit of all creditors in proportion to the amount of their respective claims, and the trusts arising under the same shall be administered in conformity with the provisions of this chapter. [56 v. 231, § 16.]

See § 6335 notes. Assignments for preferred creditors inure to all, 5 O. S. 218; W. 261; 698, and assignments for part of creditors, 9 O. S. 546, (act 1853) to secure all creditors but one, 1 D. 427, and mortgage to secure debt due mortgagee, 20 O. 389, to several creditors, 2 D. 224, to several indorsers to indemnify them and secure other creditors, 4 O. S. 602, but mortgage to secure two creditors mortgagees held not to inure to all, 4 W. L. G. 97. Assignments in trust inure to all creditors, 1 O. S. 45; 4 O. S. 45; 602. But a creditor has a right to secure himself by obtaining a lien on the property of a failing debtor and if done fairly he may thus obtain a preference over other creditors, 20 O. 540; 4 O. S. 602. Preferences may be given by direct transfers, 5 O. 178; 11 O. 394; 8 O. 390, may be conditional by way of mortgage, 20 O. 540, 545, or given by confessing judgment, 1 H. 875; 4 Johns. Ch. 682; 26 Pa. St. 92. In all cases they must be made in good faith and not in trust, 1 H. 875; 1 O. S. 237. The statutes of 1835, 1838, 1853 and 1859 did not affect absolute conveyances, 11 O. 394, 399; 8 O. 390, 391 nor conditional by way of mortgage unless for the benefit of another creditor than the mortgagee. Burrill on Assignments, citing, 4 O. S. 45; 602; 1 *Id.* 237; 10 *Id.* 170; 5 *Id.* 218. Assignment giving preference is void as to the preference, 9 O. 92. Deed of assignment giving preferences to be construed strictly, 14 Bull 168.

Mortgage of lands executed by an insolvent debtor to a trustee to secure a *bona fide* indebtedness to his wife, does not inure to the benefit of all the creditors of the mortgagor, 40 O. S. 287. A mortgage in trust to secure the debt of an infant creditor, who, without a trustee or guardian, could not have made the security available to himself, will be held not to inure to the benefit of all the creditors of the mortgagor, 17 Bull 64, 66, see § 6335n, *mortgage*.

§ 6344. **Transfers, etc., to hinder, delay or defraud creditors void—Application of creditor—Appointment of trustee—Notice of suit by creditor.** All transfers, con-

veyances, or assignments made by a debtor or procured by him to be made with intent to hinder, delay, or defraud creditors, shall be declared void at the suit of any creditor; and the probate judge of the proper county, after any such transfer, conveyance, or assignment shall have been declared, by a court of competent jurisdiction, to have been made, with the intent aforesaid, or in trust with the intent mentioned in the next preceding section, shall, on the application of any creditor, appoint a trustee according to the provisions of this chapter, who, upon being duly qualified, shall proceed by due course of law to recover possession of all property so transferred, conveyed, or assigned, and to administer the same as in other cases of assignments to trustees for the benefit of creditors: provided, however, that any creditor instituting a suit for the purpose aforesaid, shall cause notice of the pendency and object thereof to be published for at least four consecutive weeks in some newspaper printed or of general circulation in the county in which said suit shall be pending; and all creditors who shall, within fifteen days next after the expiration of said notice, file an answer in said action in the nature of a cross-petition, praying to be made parties thereto, and setting forth the nature and amount of their respective claims, and shall secure the payment of their *pro rata* share of the costs and expenses of such action, including reasonable counsel fees, in proportion to the amount of their said claims, either by a deposit of money, or by an undertaking given to the plaintiff in such sum, and with such security as the court or clerk thereof shall require and approve, shall be first entitled, with the plaintiff, to the benefits of such transfer, conveyance, or assignment, in proportion to the amounts of their respective claims; and in case of such notice being given, the court in which such transfer, conveyance, or assignment shall have been declared to have been made with the intent aforesaid, may proceed fully to administer the trust, both as to the creditors who are parties as aforesaid, and those who have not come in and been

so made parties, distributing to the latter the surplus, if any, after satisfying the claims of those who have preference as aforesaid; but if such court shall not so administer the trust, or if such notice shall not have been given, the said court shall forthwith, on declaring the intent aforesaid, cause a copy of the judgment to be certified to the proper probate court, which shall, on its own motion, appoint a trustee as in this chapter provided; and after the costs and expenses aforesaid, and the claims of the aforesaid preferred creditors shall have been paid by such trustee, the residue in his hands, if any, shall inure to the equal benefit of the remaining creditors, in proportion to the amount of their claims. [60 v. 8, § 17.]

Notes.—See § 6335 notes. The act of 1835 (Swan's stat. 1841 pp. 717, 718) was directed against fraudulent conveyances to trustees in contemplation of insolvency, preferring creditors, 8 O. 390; 391; the act of 1838 (Swan's stat. 1854; p. 468) against all conveyances to trustees in contemplation of insolvency preferring creditors *Id.*; the act of 1853 (S. & C. p. 718) against all fraudulent conveyances, and the act of 1863 (1 Sayler p. 354,) gave creditors the remedy provided in this section. The act of 1859 applied to fraudulent conveyances made before as well as after its passage, and a creditor by filing his petition, etc. could obtain no priority over other creditors of the insolvent debtor, 14 O. S. 443.

Evidence.—*Fraud* is not presumed, W. 505, burden of proving is on the party setting it up, 5 O. S. 124, of showing solvency of debtor on defendant, 23 O. S. 473; 2 *Id.* 373, of showing consideration when assignment recites none, on assignee. 16 O. S. 88. Grantee may show fraud, 1 O. S. 262. Fraud need not be proved beyond a reasonable doubt, 1 C. S. C. R. 292. Secret trust *prima facie* evidence of, 16 O. S. 88. Sale just before judgment evidence of but not conclusive, 3 O. 527; retaining power of sale evidence of, 20 O. 389; 1 O. S. 246. Subsequent acts of vendor not evidence against vendee, 37 O. S. 194. Debtor's examination under § 5472 competent evidence in action to set aside sale, 40 O. S. 345. Other considerations than that named in the deed may be shown, 21 O. S. 295.

Judgment.—Copy of to be certified to probate court, 39 O. S. 203.

Limitation.—Action barred after lapse of four years, under § 4982; 32 O. S. 228; 2 C. S. C. R. 523.

Notice of the pendency and object of the suit must be given, 21 O. S. 295 (Act 1863); 39 O. S. 203; 1 Bull 109, see 2 C. S. C. R. 40.

"Or procured by him to be made."—Before the insertion of this clause it was held that the statute operated only upon fraudulent transfers, etc., made by the debtor himself, and that where an insolvent debtor purchased real estate with intent to

defraud his creditors and caused the vendor to convey it to another, who conveyed it to his wife, such conveyance was not within the meaning of the statute, but his interest must be subjected under § 5464, 34 O. S. 645 (Act 1863). Under a subsequent amendment which did not contain this clause, it was held that where a person insolvent at the time executed a note without consideration to another with warrant of attorney to confess judgment and judgment was taken and execution issued and levied on the goods of the maker of such note the transaction was within the meaning of this section, 42 O. S. 168, 171.

"By a court of competent jurisdiction."—The probate court has no jurisdiction to set aside fraudulent conveyances, nor to declare transfers to have been made with intent to prefer, etc., 17 Bul 64, citing 44 O. S. 497, see § 6140 n.

Parties.—Any creditor may bring the action before, 32 O. S. 228; 2 C. S. C. R. 523, or after judgment, 13 O. S. 263 or levy, 29 O. S. 597, and a creditor of an insolvent corporation after appointment of receiver, 40 O. S. 575, and administrator of fraudulent grantor, 29 O. S. 264 (*quære*, 34 S. 1); when necessary to sell land to pay debts, § 6139, 6140, see 44 O. S. 497, but creditor sanctioning fraud can not, 8 O. 529; 3 O. S. 544, and creditors with notice of bill under act (4 Cur. 3352) can not afterward sue though notice was not published, 2 C. S. C. R. 40. Parties to fraud and their privies estopped to impeach it, 15 O. 408. Fraudulent vendor and vendee necessary parties, though not united in interest under § 4987; 39 O. S. 563, and beneficiaries of the conveyance, 7 Bull 113; but party having no interest can not be made defendant, 6 Bull 666. Creditors of vendor may file cross-petition in replevin by fraudulent vendee, 1 C. S. C. R. 292. Claimant for tort must reduce it to judgment, 30 O. S. 11.

Pleading.—Petition must aver that the conveyance was made with intent to hinder, delay or defraud subsequent creditors, 30 O. S. 11; 1 O. S. 51; 9 O. S. 430 (intention not material in case of existing creditors, 21 O. S. 295; 304; 16 O. S. 433) must describe the property with such definiteness as to enable it to be identified, 2 Wall 237. Where the petition shows that the conveyance was made more than four years prior to the action it must aver that the fraud was not discovered within that period, 32 O. S. 228; 2 C. S. C. R. 523. But it need not aver that there is no other property out of which to make the claim by execution, 29 O. S. 597; 25 O. S. 500; nor that the creditor has reduced his claim to judgment, 32 O. S. 228; 2 C. S. C. R. 523.

Secured creditor.—Conveyance not fraudulent as to, 40 O. S. 184; 8 Rec. 358.

What is fraudulent conveyance, etc.—Confession of judgment without indebtedness and levy and sale under it, 42 O. S. 168. Conveying property in fraud of intended wife, 40 O. S. 107, see 41 O. S. 147. Purchase in wife's name, W. 339, or child's, 6 O. S. 52. Gift by one in debt *prima facie* fraudulent, 5 O. 121; 2 O. S. 373; 23 O. S. 473. Secret trust, 16 O. S. 88. Retaining possession in sale by warehouse receipt, 37 O. S. 254. Sale of goods to delay creditors, 20 O. 389; 33 O. S. 246. Mortgage, 9 O. S. 480, for double amount, due, 36 O. S. 442 (*bona fide* mortgagee of vendee protected, 18 O. S. 546; 38 *Id.* 76.) Conveyance to qualify surety who agrees to re-convey, 6 Bull 63, but gift without intent to defraud is not, 1 O. S. 1, nor gift if enough property

is left to pay debts, 15 O. 108; W. 751, nor joint debtor's conveyance to co-debtor to pay joint debt, 6 Bull 67, nor conveyance in payment of debtor and for his assuming grantor's debt, *Id.* 825; nor sale for notes to pay creditors, 7 Bull 64, nor conveyance to equitable owner, W. 371, nor conveyance to wife for former release of dower, 9 Rec. 623; nor conveyance to trustees for benefit of grantor's wife and children as against a creditor whose claim was at the time amply secured by mortgage. And the fact that the mortgage security is subsequently lost by the creditor's laches does not make such conveyance fraudulent, 40 O. S. 184:

§ 6345. **Unsettled assignments heretofore made—citation of assignee to give bail.** In all cases of assignments heretofore made, where no final settlement and distribution has been made, the probate judge of the proper county shall have the power, on the application of any creditor of the assignor, to issue a citation against such assignee, requiring him to appear before such probate judge, on the day named in such citation, to show cause why he should not give bail for the execution of his trust according to the provisions of this chapter; and such probate judge, on good cause shown, may require such assignee to give bail according to the provisions of this chapter; and in case such assignee shall fail to appear as required by such citation, or shall fail to give bail within the time ordered by such probate judge, such probate judge shall remove him and appoint another trustee, and after the giving bail by any assignee, or trustee so appointed, as provided in this section, the same proceeding shall be had as provided in this chapter in case of assignments hereafter made. [56 v. 231, § 21.]

§ 6346. **Notice of appointment.** Every assignee, or trustee appointed on the assignee failing to qualify, shall within thirty days after giving bond, cause notice to be given in some newspaper of general circulation in the county, for three successive weeks, of his appointment as such assignee or trustee. [56 v. 231, § 4.]

Form.—Notice is hereby given that the undersigned has been duly appointed and qualified as assignee in trust [*or trustee*] for the benefit of the creditors of A. B., of _____ county, Ohio, by the probate court of _____ county, Ohio.

A. B., Assignee, [*or Trustee*] etc.
Office, _____

§ 6347. Appointment of appraisers.—Return of inventory and appraisement—When justice may appoint appraisers—Real estate without the state assigned for benefit of creditors need not be appraised—Filing schedule of debts of assignor. Immediately upon the assignee giving bond, or if the assignee fail to give bond, then upon the trustee appointed by the court giving bond, the court shall appoint three suitable, disinterested persons appraisers of the property and assets of the assignor; and the said assignee or trustee shall, within thirty days after giving bond, unless for good cause shown the court shall allow a longer time, make and file in the court an inventory, verified by his oath, of all the property, moneys, rights, and credits of the assignor included in the assignment, which shall have come to his possession or knowledge, together with an appraisement thereof by said appraisers under their oath: provided, however, that if any part of said estate or effects be in any other county, the assignee or trustee may have appraisers as to such part of the estate and effects, appointed by any disinterested justice of such county; and provided, further, that if the assignment includes real estate situate without this state, it shall not be necessary to have such real estate appraised, but the assignee, or trustee appointed by the court shall sell such real estate at public or private sale, and the sale shall be confirmed, if the court find that the same has been made in good faith and for a fair price; and at the time of filing the inventory, the assignee or trustee shall also file a schedule of all the debts and liabilities of the assignor within his knowledge, which schedule shall be verified by the oath of the assignee or trustee; which schedule shall contain the post-office address of each of such alleged creditors as far as the same can be given. [56 v. 231, § 3, 4; 63 v. 41, § 1.]

6 O. S. 611; 31 O. S. 158, 201; 41 *Id.* 70. See forms under § 6046, 6157.

§ 6348. Exempt property excepted unless expressly waived, and wife's property; homestead to be set off. No assignment for the benefit of creditors shall be con-

strued to include or cover any property exempt from levy or sale on execution, or from being by any legal process applied to the payment of debts, unless in the assignment the exemption is expressly waived, or any property belonging to the wife of the assignor, nor to require the assignor to deliver up any of such property; and as to the homestead exemption, and exempt property that has to be selected by the debtor and his wife, the appraisers appointed by the court shall, on making the appraisement, set the same off in the same way that appraisers of property levied on or attached are required to do; and if, for any reason this setting off is then omitted, the court may at any time thereafter, and before sale, order the same to be done by the appraisers. [58 v. 3. § 15.]

Probate court can allow five hundred dollars in lieu of homestead, 40 O. S. 631. After assignment assignor may select as exempt property previously attached, 38 O. S. 530. Assignor's wife entitled to allowance in lieu of homestead against assignee though family dwelling house was burned previous to sale by assignee, 31 O. S. 437. Judgment recovered after assignment no lien on land previously set apart as homestead, 45 O. S. 825; 18 Bull 316.

§ 6349. **Examination of assignee, etc.** Orders to prevent fraudulent transfer. The probate judge may, on the application of the assignee, or of any creditor, or without any application, at all times require the assignor, upon reasonable notice, to attend and to submit to an examination on oath upon all matters relating to the disposal of his property, to his trade and dealings with others, and his accounts concerning the same, to all debts due or claimed from him, and to all other matters concerning his property and estate, and the due settlement thereof according to law, which examination may, at the request of any party to the proceeding, be reduced to writing; and the said probate judge may, in like manner, at any time before the final settlement of the accounts of the assignee, require the attendance of the assignee, or any other person as a witness, and examine him or her upon oath, as to all matters appertaining to the estate of the assignor or to the administration of the said trust; and the said probate judge may, upon or after such examination, make and enforce any orders

upon proper parties, which he may deem necessary to prevent any fraudulent transfer or change in the property or effects of the assignor, or the allowance or payment of any unjust or fraudulent claim out of his estate. [69 v. 172, § 12.]

§ 6350. Conversion of assets into money--sale of real and personal property--compromise or sale of claims--completing real contracts--wife of assignee may be made a party and ask court to have real estate sold free of contingent right of dower--court on application of seven-eighths of creditors may order business of assignor carried on by assignee; compensation of assignee. The assignee or trustee shall proceed at once to convert all the assets received by him into money, and to sell the real and personal property assigned, including stocks, and such bonds, notes, and other claims as are not due, and which can not probably be collected within a reasonable time, either for cash, or upon such other terms as the court may order, at public auction, at such time and place as may be designated in notice given by advertisement in some newspaper of general circulation within the county, for four consecutive weeks, and of which sale due return shall be made to the judge; but all such sales of real estate shall be made at not less than two-thirds the appraised value thereof, being subject to re-appraisement as upon executions at law, and such sale shall be set aside, or confirmed, as the court shall order; and if confirmed, deeds shall be made to the purchasers, conveying the title free from all liens on the same for all debts due by the assignor. Whenever the court shall be satisfied that it would be for the advantage of the creditors of the assignor to sell any part of the real or personal property assigned, at private sale, the court may authorize the assignee or trustee to thus sell the same, either for cash, or upon such terms as the court may order; but such real estate shall, in no case, be sold for less than two-thirds its appraised value; nor shall such personal property be sold for less than two-thirds of such appraisement, unless the court shall, upon good cause shown, order the assignee to sell the same for a less amount; and a return of such sale

shall be made within the time prescribed by the court; and such sale shall be confirmed by the court before the same shall be complete and binding; and if confirmed, deeds shall be made of the real estate, to the purchasers, conveying the title, free from all liens on the same, for all debts due by the assignor. Should any property thus ordered to be sold at private sale, be not sold within the time prescribed by the court, then the court shall order the same to be sold at public auction, in the same manner as though a private sale had not been ordered; and the assignee, or trustee may with the approval of the court compromise or sell any claim or demand on behalf of the assignor which is desperate, or difficult of collection; and he may, also, with the approval of the probate court, complete and enforce all sales of real estate made by the assignor, making all needful conveyances for that purpose: provided, however, that the limitation as to the price for which real estate shall be sold, shall not apply to real estate situate out of the state, and provided further, that when any real estate is to sold under the provisions of this section the wife of the assignor may be made a party, and she may file her answer and ask the court to have said real estate sold free of her contingent right of dower, and to allow her, in lieu thereof, such sum of money, out of the proceeds of the sale, as the court deems the just and reasonable value of her contingent dower interest therein; and such answer of the wife of the assignor shall have the same force and effect, and shall be taken and held to be, in all respects, as a deed of release to the purchaser of such real estate of the contingent dower interest therein of such wife. It is further provided that, where said wife has executed a mortgage jointly with her husband on any of the real estate aforesaid, or where the husband alone has executed a mortgage as security for the payment of the purchase price or a part thereof, or any of the said real estate, such court shall order the sale of the same free from the contingent right of dower of such wife, and shall find and determine the just and reasonable value of such wife's contingent dower interest in the balance of the proceeds of such sale of

real estate after the payment of such incumbrances as preclude her right to dower therein; provided that whenever the court shall be satisfied that it would be for the advantage of the creditors of the assignor, the court may, on a written application made to him by seven-eighths in number and amount of said creditors, order any business carried on by the assignor at the time of the assignment to be carried on by the assignee, and said court shall order the discontinuance of said business whenever he deems it to the advantage of said creditors, and said court shall fix such compensation for said assignee when ordered to continue said business, in addition to the fees now allowed by law as may be just and proper. [77 v. 189; 68 v. 41, § 1; 58 v. 105, § 5; 56 v. 231, § 18.]

§ 6351. **Payment of liens—action to settle liens—questions of title—homestead rights.** The probate court shall order the payment of all incumbrances and liens upon any of the property sold, or rights and credits collected, out of the proceeds thereof, according to priority: provided, that the assignee may, in all cases, where the real estate to be sold, or which may have been contracted to be sold by the assignor prior to the assignment is incumbered with liens, or where any question in regard to the title, or the dower estate of the wife or widow of the assignor, require a decree to settle the same commence a civil action therefor in the common pleas court or probate court of the proper county, making all persons in interest including the wife or widow of the assignor parties to such proceedings; and upon hearing, the court shall order a sale of the premises or the completion of the contracts of sale so made by the assignor, the payment of incumbrances and the contingent dower interest of the wife, or widow, subject to the proviso hereinafter contained, and determine the question involved in regard to the title of the same; and the proceeds of the real estate so sold, after the payment of liens and incumbrances and the contingent dower rights and interest of such wife or widow, as ordered by such court, shall be reported to the probate court by the

assignee, and disposed of as provided in this chapter: provided, that the provisions of § 6350 in relation to the wife of the assignor as a party to proceedings thereunder, and her rights by virtue thereof, and also the provisions of such section as to ordering property sold at private sale, and upon terms of credit, shall apply to proceeding under this section; but nothing in this section nor § 6350 shall be so construed as in any way to impair the right of homestead exemptions, or the right of an allowance in lieu of homestead, or the mode provided by law for enforcing such rights. [83 v. 236.]

Petition for sale of real estate.—A. B., as assignee for benefit of the creditors of C. D., plaintiff, vs. C. D., E. D., G. H. and I. J., defendants. Probate Court, _____ county, Ohio.

Plaintiff states that on the _____ day of _____ 188— the defendant, C. D. made an assignment to him of all his property for the benefit of his creditors, which assignment was on the _____ day of _____ 188— at _____ o'clock, _____ M. duly filed in the probate court of said county as assignment No. _____ on the assignment docket of said court, and thereupon plaintiff duly qualified and entered upon his duties as such assignee. That among the property so assigned was the following real estate. [*here describe real estate.*] Plaintiff further states that it is necessary to sell said premises to pay the costs of said assignment, the liens on said premises, the exemption in lieu of homestead allowed to said assignor and the general creditors of said assignor, and that there are not sufficient assets to pay said charges and the claims against said estate without the sale of said premises. That said E. D. is the wife of said C. D., and as such has a contingent right of dower in said premises. That said C. D. is interested in the sale of said premises for the exemption due him in lieu of a homestead, and also for the surplus if any which may remain from the sale of said premises after the payment of all his debts, and that G. H. and I. J. each claim a lien on said premises by way of mortgage. Wherefore your petitioner prays that said premises may be ordered sold free and clear of all claims of all parties to this suit and that he may have such other and further relief as the nature of his case entitles him to. _____ Attorney for plaintiff.

[*Verification.*]

FORMS:

<i>Waiver of summons and consent to sale,</i>	§ 6143.
<i>Affidavit to obtain publication,</i>	§ 6143.
<i>Notice to parties by publication,</i>	§ 6143.
<i>Affidavit of proof of publication,</i>	§ 6089.
<i>" " " " mailing notice,</i>	§ 6143.
<i>Answer of widow waiving assignment of dower, etc.</i>	§ 6143.
<i>Answer and cross-petition of lien holder,</i>	§ 6143.
<i>Answer of minor defendants by guardian ad litem,</i>	§ 6144.
<i>Judgment and order to appraise,</i>	§ 6155.
<i>Inventory and appraisement,</i>	see § 6046.
<i>Report of appraisers,</i>	§ 6157.
<i>Approval of appraiser's report and order for sale,</i>	§ 6161.
<i>Bond for sale,</i>	§ 6150.
<i>Notice of sale,</i>	§ 6159.
<i>Report of sale,</i>	§ 6162, when no sale effected, Id.
<i>Order of re-appraisement,</i>	§ 6162.
<i>Confirmation—Deed,</i>	§ 6162.

Consent of creditors that business be carried on by assignee. [Title.]—The undersigned creditors of the firm of A. B. & Co., in the amount set opposite our respective names, do hereby consent that the business of said firm may be carried on by the assignee thereof under the order and direction of the Probate court of — county, pursuant to law as the same has been heretofore carried on.

Entry. [Title.]—This cause came on to be heard upon the application of X. Y., assignee of the firm of A. B. & Co. And it appearing to the court that seven-eighths in number and amount of the creditors of said firm have signed a written application and consent that the business of said firm may be carried on by the said assignee, and the court being satisfied that it would be for the advantage of said creditors that said business should be carried on, it is hereby ordered that the said assignee carry on the business of the said firm in the same manner as the same has heretofore been carried on by the said firm until the further order of this court.

Application to raise assignment. [Title.]—And now comes C. D., and says he is the assignor herein, who made an assignment to A. B., of all of his property and effects for the benefit of creditors; that since said assignment all of his creditors have been paid in full and that there are no other claims outstanding against him. And he asks the court to raise said assignment and order a re-conveyance to himself. C. D.

[Verification.]

Journal entry. [Title.]—This cause came on this day to be heard upon the application of C. D., to raise the assignment herein, the proofs and exhibits, and it being made to appear to the satisfaction of the court that all the creditors of said C. D. have been paid in full, and no reason appearing why the assignment should not be raised, it is ordered that the real estate conveyed to the assignee be by him re-conveyed to said C. D., by deed duly executed and that said C. D. pay to the assignee herein — dollars, and to his attorney — dollars in full for their services and also the costs of this case, and that thereupon the said assignment be raised and said assignee discharged,

Notes.—Power of probate court to fix priority of lien-holders, distribute proceeds and determine all legal and equitable questions arising therein, 45 O. S. 141; 17 Bull 379; affirming, 2 C. C. R. 73; reversing, 16 Bull 38; § 5416 applies where assignee has commenced to sell realty of assignor, 40 O. S. 330.

§ 6352. **Presentations of claims—their allowance or rejection—limitation of suit on rejected claims—report of assignee, etc.** Creditors shall present their claims within six months after the publication of the notice hereinbefore provided for, unless further time is allowed by the court to the assignee or trustee for allowance, and the assignee or trustee shall indorse his allowance or rejection thereon, and claimants whose claims are rejected, shall be required to bring suit against the assignee or trustee, to enforce such claims within thirty days after the same shall have been rejected, in which, if they recover, the judgment shall be against the assignee or trustee, that he allow the same in settlement of his trusts, with or without the costs, as the court shall think right; and immediately after the expiration of said six months, the assignee or trustee shall file in the court a report of all claims presented to him for allowance, their several amounts, and the date from which, and the rate at which the several claims are entitled to interest, specifying what claims have been allowed, and what ones rejected, with the date of allowance or rejection; and what, if any, claims are held under advisement; and the post-office address of every creditor whose claim is either allowed or rejected. [57 v. 118, § 6.]

See § 6097. Creditors failing to present claims in six months can have their share of funds remaining, 4 W. L. M. 332; 33 O. S. 439; 41 O. S. 295; 12 Bull 286. Limitation of thirty days does not apply to action by mortgagee against assignee for proceeds of mortgage property, 40 O. S. 602. Conditional allowance insufficient, 33 O. S. 439. Amount of recovery in action by creditor whose claim has been allowed, on assignee's bond for failure to account for property assigned, 32 O. S. 590. If assignee allows claim as a valid one *quære* whether action will lie in common pleas to compel him to allow it as preferred claim against certain fund in his hands, 2 C. C. R. 382. Notice of demand and non-payment to assignee of indorser of note insufficient, it should be given to indorser, 43 O. S. 346, 355. Unless the liability of the indorser be fixed by demand and notice of non-payment the indorsed note can not be proved as a claim against the estate in insolvency, *Id.*, see 33 O. S. 295,

§ 6353. When claim shall be disallowed on application of assignor or creditor and proceedings in such case. If the assignor or any creditor shall file in the court a written requisition on the assignee or trustee to disallow any claim or claims presented, which he has not reported as disallowed, and shall enter into bond to the assignee or trustee in such amount and with such sureties as the court shall approve, conditioned to pay all the costs and expenses of contesting the same, such claim or claims shall be, by the order of the court, disallowed, although the same may have before been allowed by the assignee or trustee; and the assignee or trustee shall forthwith give written notice of such disallowance to the creditor or creditors, or his or their attorneys, whose claim or claims are so disallowed; and thereupon the same proceedings shall be had as required in other cases of disallowance, by the preceding section. [56 v. 231, § 8.]

Forms of bond, requisition and entry may be adapted from forms under § 6098.

§ 6354. Affidavit to be filed with claim before allowance or payment, and right of surety to prove. Every person presenting and filing a claim against the estate of the debtor, and before the same shall be allowed or any payments made thereon, shall make and file an affidavit setting forth that the said claim is just and lawful, and the consideration thereof, and what, if any, set-offs or counter-claims exist thereto; what collateral or personal security, if any, the claimant holds for the same, or that he has no security whatever, and the assignee, or trustee, or any creditor shall have the right to examine the claimant under oath touching any such collateral or other security, or any other matter relating to said claim, within such time and under such regulations as shall be prescribed by the probate judge; any surety of, or person jointly liable with, the assignor, may be allowed to present and prove the claim on which he is so bound; but the dividend thereon shall be payable to the party holding the claim; and if the latter prove such claim, then the allowance and dividend shall be on the claim, as proved by him, only. [56 v. 231, § 13.]

Form of affidavit,—State of Ohio—county, ss. Before

Sworn to before me and subscribed in my presence this—
day of——188—.

§ 6355. Preferred claims. All taxes of every description assessed against the assignor, upon any personal property held by him before his assignment, shall be paid by the assignee or trustee out of the proceeds of the property assigned, in preference to any other claims against the assignor; and every person who shall have performed any labor as an operative in the service of the assignor, shall be entitled to receive out of the trust funds, before the payment of the general creditors, the full amount of the wages due to such person for such labor, performed within twelve months preceding the assignment, not exceeding three hundred dollars. [57 v. 39, § 3; 58 v. 26, § 1; 75 v. 134, § 1.]

§ 6356. Reports and settlements of assignee—The declaring and payment of dividends. At the expiration

of eight months from the appointment and qualification of the assignee or trustee, and as often thereafter as the court may order, an account shall be filed with said court, by such assignee or trustee, containing a full exhibit of all his doings as such, up to the time of the filing thereof, together with the amount of all claims remaining uncollected and the amount thereof, which in his opinion may thereafter be collected, to which said accounts exceptions may be filed by parties interested, in the same manner that exceptions are or may be filed to the accounts of administrators, executors, or guardians, and such accounts shall be examined, and the exceptions thereto heard by the court, in the manner provided by law for the settlement of the estates of deceased persons; upon the filing of such accounts, the court shall fix a time for the hearing, and publish notice thereof as in the case of the filing of the account of an executor or administrator. Whenever, on settlement, the same shall show a balance remaining in the hands of said assignee or trustee, subject to distribution among the general creditors, a dividend shall be declared by the probate judge, payable out of such balance, equally among all creditors entitled, in proportion to the amount of their respective claims, against the assignor, including those disallowed, as to which the claimant has begun proceedings to establish, the same as hereinbefore required, and claims held under advisement; of the making of which dividend, and of the time and place of payment thereof, notice shall be given by advertisement once, in a newspaper published and of general circulation in the county in which such trust is being administered, and in such other way as the court may order; of the payment of which dividends and those remaining uncalled for and unpaid at that time, report shall be made within sixty days after the day fixed for the payment of the same; the court shall then cause a new notice to be given to the owners of the unpaid dividends, in such way as the court may direct; and if the same are not demanded within twelve months thereafter, the same shall be divided *pro rata* among the other creditors, until they are paid in full, and the remainder, if any, to

the assignor or his legal representatives. The dividends reserved for claims disallowed, or held under advisement, when the proceedings to enforce their allowance have been commenced, as to claims disallowed, shall be held until said proceedings have terminated, when they shall be paid, if the allowance of the claim has been ordered, on the same; otherwise they shall be distributed *pro rata* among other creditors not paid in full, or refunded to the assignor, as the case may require. [73 v. 146, § 10.]

See § 6352 n.

An assignee delaying unreasonably to file his account as required by law will be charged with interest from the date his account became due. A delay of six years to account after the date at which the account became due is an unreasonable delay and sufficient to charge him with such interest, 15 Bull 311.

§ 6357. **Commissions of assignee. Further allowance. Counsel fees, etc.** Before any dividend is declared, the assignee or trustee may be allowed the following commission upon the amount of the personal estate collected and accounted for by him, and of the proceeds of the real estate sold under an order of court for the payment of debts, which shall be received in full compensation of all his ordinary services, that is to say: For the first thousand dollars, at the rate of six per centum: For all above that sum, and not exceeding five thousand dollars, at the rate of four per centum: And for all above five thousand dollars, at the rate of two per centum. And in all cases, such further allowance shall be made as by the court shall be considered just and reasonable for his actual and necessary expenses, and for any extraordinary expenses, and for any extraordinary services not required of an assignee in the common course of his duty, also such reasonable counsel fees as may be necessary for the proper administration of said assignment, whether performed by the assignee or trustee as attorney, or such other as may be employed by him, but that no such further allowance, extraordinary expenses, or services, or attorney fees, shall be allowed by the court unless a bill of items be filed, showing such actual and necessary or extraordinary expenses and services, or attorney fees, together with the affidavit of the person incurring such expenses or

performing such services, showing that the same were performed for and were necessary to the assignment, and that the amount charged therefor is reasonable, and not more than is usually paid for such services; and when such services shall have been performed by persons other than the assignee or trustee, the assignee or trustee shall also file an affidavit, stating that such services were necessary for the proper administration of the assignment, that they were performed under his direction, that the charges for the same are fair and reasonable, and that the full amount thereof has been paid to the party performing such services. [71 v. 28, § 11.]

Reasonable attorney's fees allowed, 37 O. S. 218; not until prior liens discharged, 3 Bull 427; 1 Bull 133. No allowance to assignee for expense of employing auctioneer unless court directing sale is of opinion his services were necessary, 37 O. S. 218. Assignee not allowed more than executor (see § 6188) or guardian for similar services, 85 N. Y. 187; 9 Paige 398. Assignee maladministering not entitled to compensation, 15 Bull 311. Attorney rendering services to assignee has no right of action against estate though services were such that if the assignee paid for them he would be entitled to a credit for such payment in his account as assignee in the probate court, 19 Bull 119.

§ 6358. **Fees of probate judge.** The probate judge shall be entitled to the following fees for services performed under the preceding sections of this chapter: For hearing and deciding each application, two dollars; for appointing or removing any assignee or trustee, one dollar; for filing assignment, inventory, and schedule, each, ten cents; and for filing all other papers, each, five cents; and for all other services, the same compensation as may be provided for like services, in the settlement of the estates of deceased persons. [56 v. 231, § 20.]

ASSIGNMENTS TO AVOID ARREST.

§ 6359. **Commissioner of insolvents—His appointment, bond and term.** The probate court in each county shall appoint a commissioner of insolvents, who shall give bond to the state in a sum fixed by the court, not less than one thousand dollars, and

with sureties to be approved by the court, and conditioned for the faithful discharge of his duties, and hold his office for three years, unless sooner removed by the court. [29 v. 329, §§ 1, 2, 3, 4.]

§ 6360. Where office kept and vacancy how filled. The commissioner shall keep his office at the county seat; and the court appointing him may, at any time, remove him, or accept his resignation, [and on a vacancy occurring by death, resignation,] removal, expiration of term or otherwise, the court shall appoint a successor, who, upon qualifying, shall be entitled to demand and receive all books, papers and assets of every kind appertaining to the office, or in the possession of his predecessor, as commissioner, and who shall proceed with the business of the office as if no change had been made. [29 v. 329, §§ 4, 5, 49, 53.]

§ 6361. Application of person arrested and schedules to be made. . When any person, whether a resident in this state or not, shall be arrested, or be in custody of any sheriff, or other officer, on *mesne* or final process, in any civil action, the officer having such person in custody, if requested by him, shall go with such person before the commissioner of insolvents of the county where such person shall be arrested, or in custody; whose duty it shall be, if required, to make out for such person in custody, and under his direction, an accurate schedule in writing of all debts by him owing, specifying the names of the persons to whom owing, and the original consideration thereof, and whether the same are by bond, note, or other contract in writing, or by book account, or otherwise, and also an accurate schedule in writing of all debts and demands owing to him with a pertinent description of all contracts in which he is in any way interested, and of all property of every kind, real and personal, in possession, remainder, or reversion, to which he has any claim; and such applicant shall surrender to the commissioner all written evidences of title and of claims and his books of account: provided, however, that nothing herein

shall be construed to deprive any person of any right he may have to hold property exempt from the payment of his debts, or to require him to assign or surrender any such property or rights in action to the commissioner; but a separate schedule shall be made of the exempted property, and the commissioner shall decide all questions as to the value of any property selected by the debtor as exempt, and all other questions in that behalf: and any person who may be imprisoned under any process for any fine, penalty, or costs, in any criminal proceeding, shall be entitled to the benefit of this section, at any time after he shall have been imprisoned under such process for the period of sixty days, unless the judgment in the case requires imprisonment till the fine, penalty, or costs be paid; but this provision shall not extend to any person confined in any workhouse established by any municipal corporation. [29 v. 329, §§ 7, 8, 9, 10, 48.]

Mandamus lies to compel officer to take prisoner before commissioner, 19 O. S. 581. Sheriff is not bound to support prisoner, 6 O. 438. See § 1028.

§ 6362. **Assignment of his property—Form—Effect—Suits by commissioner—Pending suits.** Before any person making application as aforesaid, shall be entitled to a certificate from the commissioner, as hereinafter provided, he shall make and deliver to the commissioner an assignment, in writing, of all his property, rights and credits of every kind and description, except only exempted property or rights; but no particular form of words shall be necessary to the validity of said assignment; and the same, when made and delivered to the commissioner, shall operate as a conveyance of all the property of such applicant, and shall vest in the commissioner all the rights, legal and equitable, which such applicant had in or to any property, rights, and credits, whether the same be mentioned or described in such schedules and inventory or not, except as aforesaid; and it shall be lawful for the commissioner to commence and prosecute suits and actions in his own name, in the same manner that the applicant could have done

before such assignment: provided, that suits pending at the time of such assignment shall not abate, but may be prosecuted and defended, by the commissioner, in the name of the applicant, to final judgment, as though such assignment had not been made. [29 v. 329, § 11.]

The choses in action of an insolvent debtor, and the legal interest in them vest in the commissioner of insolvents and he alone, can maintain an action thereon, 6 O. 271.

§ 6363. **Any other transfer of property after the arrest void.** Every assignment, transfer, or conveyance of property, either real, personal or mixed, made or executed by the applicant after his arrest, and before his examination before the commissioner, as herein provided, shall be utterly void and of no effect. [29 v. 329, § 12.]

§ 6364. **Oath of the applicant.** When any person shall make application to the commissioner, he shall, at the time of making such application, make and subscribe an oath before the commissioner, in the following form, viz: I, A. B., do swear that I was not arrested, nor am I now in custody of an officer, at the suit of ———, by any collusion or combination with the said ———, or with any other person; that I have delivered up and assigned to the commissioner of insolvents of the county of ———, all the property that I have, or claim any title to, or interest in; that the schedules and inventory of any property, rights and credits by me made, contain as far as I know or believe, a full description of all my property, rights, credits, and claims, in possession, remainder, or reversion (property exempted from execution excepted); and also all my bonds, notes, contracts in writing, and other contracts, in which I am beneficially interested, and that I have delivered the same to the commissioner; and also my books of account and all written evidences of my right or title to any property whatsoever: and that I have not, directly or indirectly, at any time, sold, conveyed, or disposed of, for the use of any person, any money, property, debt, right or claim, or intrusted the same to or with any person, thereby to defraud

my creditors, or any of them, or to secure the same so that I, or my heirs, or any other person, shall receive or expect any profit or advantage therefrom. [29 v. 329, § 15.]

§ 6365. Examination of applicant before the commissioner to be reduced to writing and subscribed. When any person shall apply to the commissioner, as aforesaid, he shall, at the time of making oath, as aforesaid, answer such questions as shall be put to him by the commissioner, or any creditor, his agent, or attorney, relative to his circumstances and the situation of his property, and the causes which occasioned his insolvency: all which questions, together with the answers of the applicant, shall be reduced to writing, and subscribed by him; and such answers shall be considered as made under the oath administered as aforesaid. [29 v. 329, § 16.]

§ 6366. Bond required of non-resident, and resident, unless, etc.—may be required in any case—when may be dispensed with. Any applicant who is a non-resident of the State, shall give bond to the commissioner, with surety to his acceptance, in a sum not less than two hundred dollars, conditioned that such applicant shall appear in the probate court of the county on the third Monday thereafter, and that he shall then and there file his petition, and submit to a further examination, pay the costs, and in all respects comply with the requisitions of the court; and a resident applicant shall be required to give a like bond, unless the commissioner is satisfied that the applicant has committed no fraud by disposing of property, and that the application is not made to enable him to remove his body out of the State; and in any case, the commissioner may, in his discretion, require the applicant to give such bond in any sum not exceeding the amount of the debt or demand for which such applicant is in custody; or if, in any case, whether applicant be resident or not, the commissioner is satisfied that the applicant has no property not exempt, and that he has not committed any fraud by disposing of property, and he has no intention of remov-

ing his body out of the State, he may dispense with the giving of bond. [29 v. 329, § 14, 1; 42 v. 29, § 2, 3.]

If the condition of the bond is substantially as required by law, it will be sufficient, 7 O. (pt. 1) 235. See 3 O. 104; 8 O. 43.

§ 6367. **Certificate of commissioner to applicant—effect.** When court may require a recognizance, etc. from applicant. When any person shall apply to the commissioner, and shall have complied with the foregoing provisions, the commissioner shall give to the applicant a certificate of his having so complied; and the certificate of the commissioner shall protect the person of the applicant from arrest or imprisonment, for any debt or demand in any civil action, at the suit of any person named in his schedule, and from any fine or penalty therein named, and for which he has been imprisoned sixty days or more, until the day his application is finally disposed of by the probate court; and if such applicant shall appear in said court, and file his petition, as required, said certificate shall protect such applicant from arrest, as aforesaid, until said petition shall be finally disposed of by the court; provided, that the court may, for sufficient cause shown, require such applicant, when his petition is continued for more than ten days at one continuance, to enter into a recognizance to the State of Ohio, for the benefit of his creditors, with surety to be approved by the court, conditioned that said petitioner shall appear and prosecute his said petition, and abide the order of the court thereon. [29 v. 329, § 20, 21; 51 v. 323, § 1.]

There is no other difference between the commissioner's certificate and the final discharge, except that the former discharges for a limited time, and the latter forever from all debts named in the schedule. The discharge in either case is a legal one, 9 O. 100.

§ 6368. **Suit on bond when forfeited—distribution of proceeds.** If any applicant for relief, shall fail to appear in court, and comply with the condition of his bond, the same shall be forfeited, and suit may be brought thereon, in the name of the commissioner, for the use of the creditors of the applicant; and the sum collected therefrom shall be distributed amongst

the creditors, as the proceeds of the effects of the applicant are distributed. [29 v. 329, § 19.]

In an action on the bond of an insolvent where he failed to prosecute his application to a final discharge, the sureties can not show in mitigation of damages that the person who gave the bond was wholly insolvent, and had no property to assign, 4 O. 172.

§ 6369. Commissioner to keep a record of his proceedings open to inspection. The commissioner shall keep a book, in which he shall enter each application made to him under this chapter, and briefly note all the proceedings had before him, in each case, severally; which record shall be open at all reasonable times, to the inspection of any person interested; said book shall be furnished to the commissioner by the county auditor, on order of the probate court, at the expense of the county. [29 v. 329, § 23.]

§ 6370. Notice of application. Immediately after granting a certificate to an applicant, as aforesaid, the commissioner shall give notice of the application by advertisement, published once in some newspaper published and of general circulation in the county, specifying the day when the applicant is required to appear in the probate court and file his petition. [29 v. 329, § 25.]

8 O. 104.

§ 6371. Return of bond, copies of schedules, etc., to court. Case to be docketed, etc. The commissioner shall, before the third Monday after a certificate is granted by him, return to the probate court the original bond (if any) given to him, and also copies of the schedules and inventories made by said applicant, and also of the examination of such applicant, and of the record of the proceedings of the commissioner, properly certified; and the court shall enter the case on its docket, and file said papers together, for the inspection of any person interested. [29 v. 329, §§ 26, 27.]

§ 6372. When petition of applicant to be filed in court. If no creditor appear and notice, etc., given, final certificate granted. On the said third Monday, or the next day, or any day prior thereto, the applicant shall file

his petition in the said court, setting forth his said application to the commissioner, and praying to be released from liability to arrest for any debt or claim named in his schedule of debts; and the court shall thereupon, on the said third Monday, or the next day, or any subsequent day after the filing of the petition, cause the creditors of the applicant to be called, and if no creditor shall appear, in person or by attorney, to resist said petition, the court may, without further examination of the petitioner, grant to him a certificate of his having complied with the provisions of law in that behalf, and obtained the relief prayed for, as aforesaid, or said petitioner may be further examined by the court: provided, that it shall first be made to appear to the court that the notice required by this chapter has been given: provided, also, that the court may, for sufficient cause shown, permit said applicant to file his petition, as aforesaid, on any day after the time above limited, not exceeding thirty days thereafter. [29 v. 329, § 28.]

Foreign discharge of foreign debtor valid, 1 O. 236; 7 O. (pt. 2) 170.

§ 6373. **Proceedings if creditor resist.** If any creditor shall appear in person, or by attorney, to resist said petition, and shall require a further examination of the petitioner, the court may continue the application to a day certain, and such further examination shall in the meantime be made before the commissioner, or any other person, as the court may direct. [29 v. 329, § 29.]

§ 6374. **How such further examination conducted.** **Adjournment of examination.** The further examination of the petitioner shall be in writing; and his answers to such questions as shall be put to him, shall be reduced to writing by himself, or his attorney, or by the commissioner, or other person appointed by the court, as aforesaid; if the petitioner, while under examination, as aforesaid, shall require further time to answer any questions put to him in writing, it shall be the duty of the person before whom such examination is had to adjourn the same for any time not exceeding one day; and such petitioner shall not

be required by his creditors, or any of them, to appear and submit to an examination, as aforesaid, more than twice, unless by adjournment, as aforesaid. [29 v. 329. §§ 30, 31, 32]

§ 6375. **Examination to be signed and filed in court.** When such examination shall be closed, the petitioner shall sign the same, and make oath to the truth thereof, before the commissioner, or before some other person authorized by law to administer oaths; and the said examination shall be returned to the court, and filed. [29 v. 329, § 33.]

§ 6376. **Proceedings on final hearing after such further examination.** Upon the final hearing of the petition, the several examinations of the petitioner may be read as evidence by any creditor; and the petitioner, and any of his creditors, may examine witnesses before the court; and they may also offer any other evidence or depositions taken according to law; and the court, on hearing, may grant to the petitioner a certificate, as aforesaid, or may dismiss his petition, as shall seem just. [29 v. 329, § 34.]

§ 6377. **How costs awarded on the final hearing—execution therefor, etc.** When the court shall dismiss the petition of any person applying for relief, judgment shall be rendered against the petitioner for all the costs that have accrued on behalf of the petitioner (except such as have been paid by him to the commissioner), and also in resisting the same; and when the court shall grant the petitioner the relief prayed, judgment shall be rendered against the petitioner for the costs before the commissioner, and in the court, on the part of the petitioner, and not before paid; and the creditors resisting such petition and failing, shall pay their own costs; and all such costs shall be taxed as in other cases, and may be collected by execution; or the court may order that the final certificate shall not be delivered until the petitioner shall pay the costs taxed against him. [29 v. 329 § 35.]

§ 6378. **Dismissal of application—effect.** If the applicant fail to file his petition within the time herein limited or allowed by the court, his application shall

be dismissed, and judgment shall be rendered against him for all costs not before paid; but the commissioner in such case, and also when the petition is dismissed on hearing, shall proceed to dispose of any assets covered by the assignment, as if the application had been granted by the court.

§ 6379. **Effect of certificate granted by the Commissioner, by the Court, etc.** When such applicant shall produce the certificate granted by the commissioner to any officer in whose custody he may be, the officer shall forthwith discharge such person out of his custody; and the officer shall return, with the process (by virtue of which he had such person in custody), a copy of said certificate; and he shall also return on said process, that, in obedience to such certificate, he had discharged the person named therein; and said certificate shall be returned to the person named therein by the officer; and the certificate, granted by the court to the petitioner, as aforesaid, shall protect the person of such petitioner forever after from arrest or imprisonment for any civil action, debt, or demand, mentioned in the schedule of his debts, made before the commissioner, as hereinbefore provided, or any fine or penalty for which he shall have been imprisoned sixty days or more; but neither certificate shall protect him from arrest or imprisonment for any debt or demand for money or property received while acting in any fiduciary capacity; and if any sheriff or other officer shall arrest any person having been so discharged by the court, such officer having knowledge of such discharge, and that the person so arrested has a certificate, so granted to him by the court, or shall refuse to discharge the person so arrested out of his custody, as soon as such certificate shall be produced and shown to him, the officer so offending shall be liable to be prosecuted in the court of common pleas, in an action for false imprisonment at the suit of the party injured; and if judgment shall be rendered against such officer for any sum whatever, in damages, the plaintiff shall recover full costs. [29 v. 329, §§ 22, 36; 51 v. 323, § 1; 41 v. 15, § 1.]

A discharge under the insolvent law on process from a state court discharges from imprisonment on process from the United States Circuit Court, 7 O. (pt. 1) 196. The act discharging insolvents from fines is constitutional, 19 O. S. 581.

§ 6380. Commissioners may administer oaths. The commissioner may administer all oaths required in matters connected with his duties. [29 v. 329, § 46.]

§ 6381. The sections of this chapter relating to voluntary assignment to govern the administration of the trust. The sections of this chapter relating to voluntary assignments shall be applied and govern the action of the court and the commissioner, as to the presentation and allowance or rejection of claims, the appraisement and conversion of assets into money, the making and paying dividends, and the fees of the probate judge, and in all other respects in the administration of the trust, except as otherwise herein provided. [29 v. 329, §§ 6, 38, 39, 40, 41, 42, 43, 44, 45; 32 v. 23, §§ 1, 2; 33 v. 50, §§ 1, 2; 44 v. 50, § 1.]

§ 6382. Fees of commissioner—to be paid in advance—other fees fixed by court. The commissioner shall be entitled to the following fees: For writing the application and bond, if any, each, twenty-five cents; for the inventories, schedules, and assignments, and for the examination at the time of application, and for all copies thereof, ten cents per hundred words; for publishing notice, twenty-five cents, in addition to the amount paid to the printer; all which he shall have a right to receive before he shall be required to give a certificate to the applicant; and for all other services he shall be entitled to receive a reasonable compensation, to be fixed by the court. [29 v. 329, § 52, 53.]

§ 6383. Who to act in absence of commissioner. Whenever the office of commissioner of insolvents shall be vacant, or in case of the death, absence, or inability of said commissioner, the duties of commissioner shall temporarily be discharged by a master commissioner, but as soon as there is a commissioner to act, all unfinished business shall be turned over to him. [44 v. 50, § 2.]

CHAPTER V.

MARRIAGES.

§ 6384. **Who may contract matrimony.** Male persons of the age of eighteen years, and female persons of the age of sixteen years, not nearer of kin than second cousins, and not having a husband or wife living, may be joined in marriage: provided, always, that male persons under the age of twenty-one years, and female persons under the age of eighteen years, shall first obtain the consent of their fathers, respectively, or in case of the death or incapacity of their fathers, then of their mothers or guardians. [67 v. 6, § 1.]

Mutual promises and cohabitation are not a marriage, 10 O. S. 181. Solemnization without a license, followed by cohabitation is, 12 O. S. 553. Marriage by minor invalid unless confirmed by cohabitation after majority, 20 O. 1; 42 O. S. 23. Marriage contract of imbecile declared a nullity, 22 O. S. 271.

§ 6385. **Who may solemnize marriage.** It shall be lawful for any ordained minister of any religious society or congregation, within this state, who has or may hereafter obtain a license for that purpose, as hereinafter provided, or for any justice of the peace in his county, or for the several religious societies, agreeably to the rules and regulations of their respective churches, to join together as husband and wife, all persons not prohibited by law. [29 v. 429, § 2.]

§ 6386. **How ministers may obtain license to marry.** Any minister of the gospel, upon producing to the judge of the probate court of any county within this state in which he officiates, credentials of his being a regular ordained minister of any religious society or congregation, shall be entitled to receive from said court a license, authorizing him to solemnize marriages within this state, so long as he shall continue a regular minister in such society or congregation. [29 v. 429, § 3.]

§ 6387. **Minister to produce to judge of county in which he solemnizes marriage, his license—record thereof—no charge.** It shall be the duty of every minister, who is now or hereafter shall be licensed to solemnize

marriages, as aforesaid, to produce to the judge of the said court, in every county in which he shall solemnize any marriage, his license so obtained; and the said judge shall thereupon enter the name of such minister upon record, as a minister of the gospel duly authorized to solemnize marriages within this state, and shall note the county from which such license issued; for which service no charge shall be made by such judge. [29 v. 429, § 4.]

§ 6388. **Record or certificate evidence.** When the name of any such minister is so entered upon the record, by the judge aforesaid, such record, or the certificate thereof, by the said judge, under the seal of his court, shall be good evidence that the said minister was duly authorized to solemnize marriages. [29 v. 429, § 5.]

§ 6389. **Before marriage, bans to be published and how, or license to be procured, where.** Previous to persons being joined in marriage, notice thereof shall be published (in the presence of the congregation), on two different days of public worship; the first publication to be at least ten days previous to such marriage, within the county where the female resides; or, a license shall be obtained for that purpose from the probate judge in the county where such female may reside. [29 v. 429, § 6.]

§ 6390. **License how obtained—consent of parent or guardian of minor how given—fees for license—for recording certificate of marriage—penalty for improperly issuing license.** The probate judge, as aforesaid may inquire of the party applying for a marriage license, as aforesaid, upon oath, relative to the legality of such contemplated marriage; and if the judge shall be satisfied there is no legal impediment thereto, then he shall grant such marriage license; and if any of the persons intending to marry shall be under age, and shall not have had a former wife or husband, the consent of the parents or guardians shall be personally given before the judge, or certified under the hand of such parent or guardian, attested by two witnesses, one of whom shall appear before said judge, and

make oath that he saw the parent or guardian, whose name is annexed to such certificate, subscribe, or heard him or her acknowledge the same; and the judge is hereby authorized to administer such oath, and thereupon issue and sign such license, and affix thereto the seal of the court; the judge shall be entitled to receive as his fee, for administering the oath and granting license, with the seal affixed thereto, recording the certificate of marriage, and filing the necessary papers, the sum of seventy-five cents; and if any judge shall, in any other manner, issue or sign any marriage license, he shall forfeit and pay a sum not exceeding one thousand dollars, to and for the use of the party aggrieved, provided that should the person then qualified and acting as probate judge be himself the party applying, he shall make the application to the judge of the court of common pleas, within and for the same county, and if there be no legal impediment thereto, said common pleas judge shall grant said probate judge a marriage license and shall thereupon certify said application, and his action thereon, to the probate court of said county for record, as in other cases. [82 v. 202.]

Affidavit for license.—State of Ohio, ——— county, ss: Personally appeared before me, the undersigned Judge of the Probate court, within and for the county of ———, A. B., who being duly sworn deposes and says that he is more than twenty-one years of age and has no lawful wife living. And that C. D. is more than eighteen years of age and has no lawful husband living; that she is a resident of the county of ——— aforesaid. And the said A. B. further says that C. D. and affiant are not of nearer relation to each other than that of second cousin, and that he knows of no legal objection to the marriage contemplated between them. A. B.

Sworn to and subscribed before me this ——— day of ——— 188—,
————, Probate Judge.

Marriage return.—Married on the ——— day of ———, 188—,
A. B. and C. D., by me, a minister of the Gospel, E. F.

In an action for damages by a father for the wrongful issuing of license for the marriage of his daughter, evidence of the bad character of the husband may be received and considered by the jury in aggravation of damages, 14 O. 1.

§ 6391. Certificate of marriage must be transmitted to probate judge and recorded—penalty. A certificate of every marriage hereafter solemnized, whether author-

ized by publication of bans in the congregation or by license issued by a probate judge, or after notice given to the congregation signed by the justice or minister solemnizing the same, or the clerk of the monthly meeting, shall be transmitted to the probate judge in the county wherein the marriage license was issued, or the congregation wherein said bans were published is situated or marriage was celebrated, within three months thereafter, and recorded by such probate judge; every justice or minister or clerk of the monthly meeting, failing to transmit such certificate to the probate judge in due time, shall forfeit and pay fifty dollars, and if the probate judge shall neglect to make such record, he shall forfeit and pay fifty dollars to and for the use of the county. [80 v. 52.]

§ 6392. **Penalty against minister or justice for solemnizing marriage contrary to the intent of this chapter, or for unauthorized person to solemnize a marriage.** If any justice or minister, by this chapter authorized to join persons in marriage, shall solemnize the same contrary to the true intent and meaning of this chapter, the person so offending shall, upon conviction thereof, forfeit and pay any sum, not exceeding one thousand dollars, to and for the use of the county wherein such offense was committed; and if any person not legally authorized, shall attempt to solemnize the marriage contract, such person shall, upon conviction thereof, forfeit and pay five hundred dollars, to and for the use of the county wherein such offense was committed. [29 v. 429, § 9.]

§ 6393. **Duty of minister solemnizing marriage of minors.** It shall be the duty of every minister, or justice of the peace, before he shall solemnize any marriage between the parties, either of whom is required, by § 6384 to obtain the consent of his or her parent or guardian, (except in cases where license shall have been obtained from the judge of the probate court), to be satisfied that the intention of marriage between such parties has been duly published, and also that the consent of such parent or guardian has been obtained, either by acknowledgment in presence of such minister or justice of the peace, or by a

certificate under the signature of such parent or guardian, and attested by one or more credible witnesses, who shall be present for the purpose of satisfying such minister or justice of the peace that such certificate was actually signed by the parent or guardian, for the purpose aforesaid. [29 v. 429, § 10.]

§ 6394. **Fines, etc., how recovered.** Any fine or forfeiture arising to the county, in consequence of the breach of this chapter, shall be recovered by a civil action, with costs of suit, in any court of record having cognizance of the same. [29 v. 429, § 11.]

CHAPTER VI.

STATISTICS OF BIRTHS AND DEATHS.

§ 6395. **Probate judge shall keep a record of births and deaths.** The probate judge shall keep a record of the births and deaths reported to him, as hereinafter provided; the births shall be numbered, recorded, and alphabetically indexed in the order in which they are received, and the record shall state, in separate columns, the date of making the record, the date and place of birth, the name, sex, and color of the child, the maiden name of the mother, and the name of the father of the child, and the residence of the parents, as fully as the same are reported; the deaths shall be likewise numbered, recorded, and indexed, and the record thereof shall state in separate columns, so far as the same is reported, the date and place of death, name and surname of the deceased, condition (whether single, married, or widowed), age, place of birth, occupation, names of parents (when an infant without name), cause of death, color, and last place of residence of such deceased person, and the date of making the record. [66 v. 69, § 1.]

§ 6396. **Duties of assessors, of physicians and midwives in certain cities, of clergymen and sextons.** It shall be the duty of the assessors of the several townships

and wards of each county of this state, to obtain, annually, the foregoing statistics, at the time each assessor shall make the assessment of his respective township or ward for the year ending the last of March, preceding each annual assessment, and report the same to the probate judge of his county, at the time of his regular report to the [county] auditor; and at the time of submitting his report to the probate judge, he shall state upon oath that he has made diligent inquiry in order to obtain the number of births and deaths, and other information required by this chapter, in his township or ward, respectively; and if any assessor in this state shall fail or refuse to make such report, or to make and file the affidavit required by this title, the auditor of his county shall withhold his order until the law has been complied with, to the satisfaction of the probate judge, except in counties containing cities of the first class, having a population of one hundred and fifty thousand and over, in which counties it shall be the duty of the physicians and professional midwives to keep a registry of the several births in which they have assisted professionally, which shall contain, as near as the same can be ascertained, the time of such birth, sex, color of the child, the names and residence of the parents; and physicians who have attended deceased persons in their last illness, clergymen who have officiated at the funeral, and sextons who have buried deceased persons, shall keep a registry of the name, age, and residence of such deceased persons at the time of their death; it shall be the duty of the physicians and professional midwives to report fully the births registered by them, as required by this chapter, to the judge of the probate court of the county every three months, viz., on or before the second Monday of the months of January, April, July, and October of each year; in case there is no physician or midwife in attendance at any birth, then the parents shall be required to report to the probate judge within one month; and physicians, clergymen, and sextons shall likewise report fully the deaths registered by them, as required by this chapter, to the judge of the pro-

bate court of the county, every three months, as above designated; and any person who shall neglect or refuse to comply with, or violate the provisions of this chapter, shall forfeit and pay for each offense the sum of ten dollars, to be sued for and recovered in the name of the state of Ohio, and the penalty, when recovered, shall be paid over, one-half to the school fund, and one-half to the party making complaint thereof. [68 v. 40, § 2.]

§ 6397. Duty of probate judge as to blanks for statistics. It shall be the duty of the probate judge to furnish to each assessor of the several townships or wards of his county, annually, and to other persons making such report, a sufficient number of properly ruled blanks, which shall be paid for out of the county treasury, upon which to make such report to said probate judge. [66 v. 69, § 3.]

§ 6398. Probate judge to keep record and transmit abstract to Secretary of State. It shall be the duty of the probate judge, receiving the reports as above specified, within fifteen days after the receipt thereof, to record the same in a book to be provided by the county commissioners for that purpose, and to transmit an abstract thereof, on or before the first Monday of August, every year, to the secretary of state, in such form as shall be prescribed by that officer, who shall file the same in his office, to be used by him in his annual report to the legislature. [73 v. 203, § 3.]

§ 6399. Original entries and copies, etc., evidence. Records open to public inspection. Every original entry, made as above described, and a copy of such entry duly certified over the seal of said court, shall be received in all courts and places as *prima facie* evidence of the facts therein stated, and said records shall be open to the inspection of the public at all proper hours. [66 v. 69, § 5.]

CHAPTER VII.

GENERAL PROVISIONS.

§ 6400. Probate judge to determine all questions, except, etc. All questions, except those arising in criminal actions and proceedings, unless otherwise provided by law, shall be determined by the probate judge, unless, in his discretion, he shall order the same to be tried by a jury, or referred, as provided for references in the court of common pleas. [51 v. 167, § 28.]

§ 6401. Bonds, etc., to be approved and filed. All undertakings and bonds, required or authorized by law to be given in the probate court, shall be, on being accepted and approved by the probate judge, filed in his office. [51 v. 167, § 26]

§ 6402. Notice of filing accounts to be published. It shall be the duty of the probate judge to cause notice to be published in some newspaper of the county, of the filing of any accounts by executors, administrators, guardians, and trustees and assignees, trustees and commissioners of insolvents, specifying the time when such accounts will be heard, which shall not be less than three weeks after the publication of such notice, at which time it shall be competent for said probate judge, for cause, to allow further time to file exceptions to said accounts; and the costs of such notice shall be paid, if more than one account be specified in the same notice, in equal proportions by the executors, administrators, guardians, trustees and assignees, trustees or commissioners of insolvents, respectively. [51 v. 167, § 20.]

§ 6403. Examination of accountants under oath. The probate judge shall have full power and authority to examine under oath, all executors, administrators, guardians, and trustees, and assignees, trustees and commissioners of insolvents, touching their accounts; and if he shall think proper to do so, he may reduce such examination to writing, and require such executor, administrator, assignee, trustee or guardian, to sign the same, and such examination shall be filed with the papers in the case. [51 v. 167, § 21.]

§ 6404. Depositions. Depositions taken according to the provisions of law for taking depositions to be used on the trial of civil causes may be taken and used on the trial of any question before the probate court, where such testimony may be proper. [51 v. 167, § 19.]

§ 6405. Fees of witnesses, jurors, officers, same as in common pleas. The fees of witnesses, jurors, sheriffs, coroners; and constables, for all services rendered in the probate court, or by order of the probate judge, shall be the same as is provided by law for like services in the court of common pleas. [51 v. 167, § 29.]

§ 6406. Notice of proceedings in probate court, how given. When notice of any proceedings in a probate court shall be required by law, or be deemed necessary by the probate judge, and the manner of giving the same shall not be directed by statute, the probate judge shall order notice of such proceedings to be given to all persons interested therein, in such manner and for such length of time as he shall deem reasonable. [51 v. 167, § 27.]

§ 6407. When appeals may be taken from probate court to court of common pleas. In addition to cases specially provided for, appeals may be taken to the court of common pleas, from any order, decision or judgment of the probate court in settling the accounts of an executor, administrator, guardian and trustees, assignees, trustees and commissioners of insolvents; and in proceedings for the sale of real estate for the payment of debts; in proceedings to increase or diminish the allowance made by appraisers of any estate to any widow, or minor child, or children for their support one year; in proceedings against persons suspected of having concealed, embezzled, or conveyed away the property of deceased persons; in cases for the completion of real contracts and from order or decision in the administration of insolvents' estates by assignees, trustees, or commissioners; and in proceedings to appoint guardians or trustees for lunatics, idiots, imbeciles or drunkards, by any person against whom such order, decision or decree shall be made,

or who may be affected thereby; and the cause so appealed shall be tried, heard, and decided in the court of common pleas, in the same manner as though the said court of common pleas had original jurisdiction thereof. [79 v. 127.]

Appeal lies from order of probate court overruling motion of imbecile ward to terminate guardianship, etc., 19 Bull 424.

No appeal allowed from probate court on order to set aside or refusal to confirm sale of assignee, 31 O. S. 201; or its approval of assignee, 34 O. S. 280.

Before amendment of 1882 if the probate court neither increased nor diminished the allowance set-off by the appraisers for years support of widow and minor children, but confirmed it there was no appeal to common pleas, 12 Bull 284. No costs recoverable when appeal to common pleas dismissed for want of jurisdiction, *Id.* Appeal does not lie to common pleas from judgment of probate court refusing to admit authenticated copy of foreign will to record, 2 C. C. R. 387. See § 5934. The general rule has been to allow but one appeal; no further right of appeal to circuit court, *Cin. Court Reporter*, Dec. 2, 1881.

Appeal to circuit court.—A party desiring to appeal his cause to the circuit court shall, at the term at which the judgment or order is rendered, enter on the records notice of such intention, and within thirty days after the rising of the court, give an undertaking with sufficient surety to be approved by the clerk of the court, or a judge thereof, as hereinafter provided, § 5227.

§ 6408. Bond on appeal—when not required. The person desiring to take an appeal, as provided in the preceding section, shall, within twenty days after the making of the order, decision, or decree from which he desires to appeal, give a written undertaking, executed on the part of the person appealing, to the adverse party, with one or more sufficient sureties, to be approved by the probate judge, and conditioned that the party appealing shall abide and perform the order, judgment, or decree of the appellate court, and shall pay all moneys, costs, and damages, which may be required of or awarded against said party, by such court; when the order, decision, or decree, from which the appeal is taken, directs the payment of money, the undertaking shall be in double the amount thereof, and in other cases, in such amount as shall be prescribed by the probate court; but when the person appealing, from any judgment or order in any court, or before any tribunal, is a party in a fiduciary capacity, in which he has given bond within the

State, for the faithful discharge of his duties, and appeals in the interest of the trust, he shall not be required to give bond, but shall be allowed the appeal, by giving written notice to the court of his intention to appeal within the time limited for giving bond. [52 v. 103, § 4, 6; 38 v. 146, § 243.]

[*Form.*].—Know all men by these presents that we, A. B., C. D. and E. F., of ——— county and State of Ohio, are held and firmly bound unto G. A., the plaintiff in said cause, in the sum of ——— dollars, for the payment whereof well and truly to be made, we do hereby jointly and severally bind ourselves, our heirs, executors and administrators. Whereas, on the ——— day of ———, A. D. 188—, the Probate court of ——— county, Ohio, made an order [*here state the nature of the order, decision or decree.*] And whereas the above named A. B., having given notice of appeal to the court of common pleas of said county. Now, therefore, the condition of the above obligation is such, that if the said A. B. shall abide by and perform the order, judgment or decree of the appellate court and shall pay all moneys, costs and damages which may be required of or awarded against him by such court, then this obligation to be void, otherwise to remain in full force.

Signed, etc., this ——— day of ———, 188—,

Executed in presence of

Notes.—Bond must be given unless appeal is in the interest of a trust, 2 C. C. R. 61-62. When assignee appeals, probate court must fix bond at double amount of balance found in his hands, 1 C. C. R. 550-551. Probate court may fix priorities subject to appeal to common pleas court, 2 C. C. R. 73, 76. Assignee having given bond for the faithful performance of his duties, need not give bond, on appeal from justice, 13 Bull 568. In such case where the assignor files his transcript in the common pleas within ten days, the appeal held good though no written notice of the intention to appeal was given to justice, *Id.* A party in any trust capacity who has given sufficient bond in this state is not required to give bond on appeal to circuit court, § 5228. If he has not given official bond he can not prosecute an appeal without giving an appeal bond, 29 O. S. 433; W. 697; and the court in such case can not dispense with it. 29 O. S. 433. Power of court to allow amendment of defective bond, 31 O. S. 137. An assignee of an insolvent estate having a personal claim against the estate can not appeal from a judgment against him in the probate court without giving bond, 2 C. C. R. 61.

§ 6409. **Transcript—when to be filed.** The probate judge shall, upon the giving of the undertaking, or notice, as aforesaid, make out an authenticated transcript of the docket or journal entries, and of the order, decision, or decree appealed from, which shall be filed with the clerk of the court of common pleas, on or before the second day of the term of said court,

next after an undertaking or notice is given, as hereinbefore provided, by the person appealing, and the appeal shall thereupon be considered perfected; the original papers pertaining to the cause may be used upon the trial or hearing in the court of common pleas. [52 v. 103, § 5.]

Transcript to be filed by *person appealing*, 2 C. C. R. 61, 62.

§ 6410. **Proceedings in common pleas — certifying same back.** Upon the decision of any cause, appealed to the court of common pleas the clerk of said court shall make out an authenticated transcript of the order, judgment, and proceedings of said court therein, and shall file the same with the probate judge, who shall record the same, and the proceedings thereafter shall be the same as if such order, judgment, and proceedings had been had in the probate court. [52 v. 103, § 7.]

§ 6411. **Code of civil procedure governs when.** The provisions of law governing civil proceedings in the court of common pleas shall, so far as applicable, govern like proceedings in the probate court, where there is no provision on the subject in this title.

§ 6412. **Affidavit before private sale confirmed.** Before the court shall confirm a sale by an executor, administrator, guardian, assignee, or trustee, made under an order allowing such officer to make private sale, the court shall require such officer to make and file an affidavit that such private sale has been made after diligent endeavor to obtain the best price for the property, and that the sale reported, is for the highest price that he could get for the property.

§ 6413. **How executors, etc., guardians and trustees may invest funds.** Executors, administrators, guardians, and trustees, may, when they have funds belonging to the trust which are to be invested, invest the same in the certificates of the indebtedness of this State or of the United States, or in such other securities as may be approved by the court having control of the administration of the trust, and whenever money coming into the hands of an executor, administrator, trustee, agent, assignee, attorney, or officer,

shall be stopped therein by reason of litigation or other lawful cause, and the same will probably be so detained for more than six months, such executor, administrator, trustee, agent, assignee, attorney, or officer, may invest the same during such detention in the same manner that trust funds are now authorized by law to be invested, or in such other manner as the probate or other court having jurisdiction of the pending litigation, or person aforesaid, may direct. [60 v. 20, § 1; 65 v. 80. § 1; 76 v. 17, § 1.]

See § 5981, 5984. *nn* 6269. Executor directed to keep funds invested may when a profitable investment offers itself larger in amount than assets of the estate supplement them with funds obtained from other parties. 98 N. Y. 300. That a trustee made imprudent investments of the trust fund upon the advice of the husband of the *cestui que* trust will not excuse him, 10 Bull 285. Trustee can not delegate to another discretion to change investments with which she was vested by the terms of the will, 19 Bull 198.

CHAPTER VIII.

APPROPRIATION OF PROPERTY BY CORPORATIONS.

§ 6414. Appropriations of private property by corporations must be made according to the provisions of this chapter. [69 v. 88, § 1.]

Abandonment.—§ 6434. Compensation not enforceable after, 17 O. S. 103. Rights of owners when canal abandoned, 12 O. S. 629; 17 O. S. 23, see 40 O. S. 647. When surplus land is sold by condemning company to another company, 43 O. S. 229. Change of use does not work an abandonment, 18 O. S. 92; 28 O. S. 643; see 34 O. S. 541.

Benefits.—"Compensation shall be assessed by a jury without deduction for benefits to any property of the owner." Const. 1851. Art. I. § 19. See § 6427; 4 O. S. 167; 308; 30 O. S. 108; R. R. Co's. § 3281. But where a local incidental benefit to the residue of the land is blended or connected either in locality or subject matter with a local incidental injury to such residue of the land, the benefit may be considered in fixing the compensation to be paid to the owner, not by way of deduction from the compensation, but of showing the extent of the injury done the value of the residue of the land, 5 O. S. 568. Benefits could be set-off under the constitution of 1802, 5 O. S. 140; 251; 14 O. 541, not general prospective benefits, 5 O. S. 40. No allowance for gen-

eral benefits in assessing damages for incidental injury to other lands of owner, 6 O. S. 182.

Change of grade of street.—When the grade of streets is first established the consequential injury to adjoining property does not constitute a taking of property, but when the grade has once been established, and the adjoining property improved with reference to the existing grade, a change in grade causing damage would entitle the abutting owner to compensation, 15 O. 474 S. C. 18 O. 229; 7 O. S. 459, and where buildings erected before a grade was established were injured by the subsequent establishment of an unreasonable grade, 34 O. S. 328. Rule of damages, 12 Bull 247

Change of use.—See Compensation. What constitutes a taking Land once appropriated, etc *infra*.

Compensation, etc.—The owner is entitled to receive the fair market value of the land at the time it is taken—as much as he might fairly expect to be able to sell it to others for, if it was not taken—and this amount is not to be increased from the necessity of the public or the corporation to have it, on the one hand, nor diminished from any necessity of the owner to dispose of it, on the other. It is to be valued precisely as it would be appraised for sale upon execution, or by an executor or guardian, and without any regard to the external causes that may have contributed to make up its present value. The jury are not required to consider how much, nor permitted to make any use of the fact that it may have increased in value by the proposal or construction of the work for which it is taken. Ranney J. in 4 O. S. 308, 332.

Where land is valued the limits of compensation may be comprehended in the following: First, the abstract value of the quantity of ground taken. Second, the value arising from the relative situation of the land taken, in connection with the residue of the owners land from which it is severed, and Third, the effect upon the residue of the owners land arising from the uses for which the appropriation is made, 5 O. S. 568, 575.

The jury should assess the compensation due the owner of the land sought to be appropriated irrespective of benefits and also the damage resulting from the diminished value of the remainder of the tract in consequence of such appropriation; and in ascertaining these amounts the jury are to take into consideration the real value of the land taken and the diminished value of the remainder, and may for that purpose, not only take into account the purposes to which the land is or has been applied, but any other beneficial purpose to which it may be applied which would effect the amount of compensation or damages, 30 O. S. 108.

Compensation—time and manner of payment.—Compensation must be made in money. Const. 1851. Art. I., § 19. An assessment of damages in “the sum of \$150, with wagonway and stop for cattle” is not therefore constitutional, 7 O. S. 220. Giving bond for damages occasioned by laying out road is not compensation in money, 5 O. S. 109. Appeal bond without deposit of damages is not payment in money, 4 Neb. 439, nor is payment in other land, 2 Dall. 304, or in benefits, 42 Ala. 83; 8 Bush 681; 36 Miss. 300, or in bonds of company, 1 Md. Ch. 107. Judgment is not compen-

sation, 64 Ia. 281; 57 Mo. 256. Payment must precede possession, 87 O. S. 147, 151, Const. Art. I. § 19. By allowing entry to be made without compensation the owner may waive this right, 70 Ga. 164; 33 Minn. 419; 32 Vt. 311; 63 Wis. 327, but not his ultimate right to damages, for that would depend upon the statutory period of limitations, 69 Ill. 818, see 34 O. S. 541, 550; 22 O. S. 275, 294.

Id. Canal property taken for Railroad.—Where land once taken for canal purposes is appropriated from the canal by a railroad, its value is not what the property is worth for canal purposes alone, or for any other particular use, but what it was worth generally for any and all uses for which it might be suitable, 18 O. S. 169.

Id. Land taken for one public use and transferred to another.—Where land originally taken for one public use is transferred to another, the measure of compensation to the owner is compensation for such additional burden and inconvenience, not common to the general public, as accrues to him and his entire tract on which the easement is imposed by reason of the change of uses to which the lands appropriated have been subjected, 18 O. S. 92. Where a strip of land was used in common by a canal and turnpike and it is taken by a railroad, and a track constructed thereon, the measure of damages to the turnpike company is the diminution of the productive value of its property caused by reason of the change of the canal to a railroad excluding however, all diminution arising merely from competition between the two roads as means of transportation and travel, 18 O. S. 417.

Id. Exposure to fire.—Damages may be recovered on account of increased danger from exposure of buildings to fire by reason of the construction of a railroad, 105 Mass. 199; 60 Me. 290, but not unless the proximity of the buildings to the railroad is such as to render the danger imminent and appreciable, 18 O. S. 92.

Id. Injury to remaining land.—The effect upon the residue of the owner's land arising from the uses for which the appropriation is made must be considered, 5 O. S. 568, 575, and the jury are to assess damages on account of the diminished value of the remainder of the tract in consequence of the appropriation, 30 O. S. 103, as impairment of access from one portion of the tract to another when the entire tract is cut asunder, 18 O. S. 92, but the damages should be estimated in relation to the entire tract and not separate tracts, 136 Mass. 398; 50 Mich. 508, unless the tracts are used as one property or business and are necessary to its enjoyment, 21 Minn. 127; 83 Wis. 629 *contra* 34 Ia. 353.

Id. Machinery and business.—If the construction of a railroad necessitates the removal of the business and machinery, the difference between the value of the machinery in connection with the business conducted on the property and its value if removed and applied to the same or other use is a proper element of damage, 17 Bull 401. Injury caused by change of grade of street, see 12 Bull 247.

Id. 'Market' value. 20 Bull 8; 17 Bull 328.

Id. Noise—smoke, etc.—No right of recovery for injury by,

when railroad authorized by law is lawfully operated, 10 O. S. 624. But in an action by the owner of property abutting on a public street of a municipal corporation which is occupied by a railroad track under an agreement with the municipal authorities by virtue of § 3283 R. S., to recover against the railroad company for injury to such property by the laying of the track it is competent to take into consideration evidence of substantial injury and loss to the property (not common to the community at large) caused by smoke, noises, and sparks of fire occasioned by running of locomotives and cars in front of the property, 18 Bull 295; 45 O. S.

Id. Probable rents, etc.—Compensation not specific remuneration is guaranteed by the law for land taken and for the damage occasioned thereby to the remainder of the premises. The difference in the value of the owner's property with the appropriation and that without it is the rule of compensation. This difference must be ascertained with reference to the value of the property in view of its present character, situation and surroundings. It can not be enhanced by proving facts of a contingent and prospective character such as the probable rents that may be derived from the property or its special value as a prospective monopoly of a roadway to the adjoining land of other persons, 33 O. S. 429.

Id. Railway crossing.—In proceeding under the statute to appropriate a right of way across the track of an existing railroad, to be used in common as a railroad crossing, the owner of such track is entitled to compensation for the property or interest therein actually appropriated, and for such consequential damages not provided for by the act of 1860 as are the direct and proximate consequence of such appropriation. But the jury in estimating these consequential damages can not include the additional expenses provided for by said act, nor take into account detention of trains, loss of future business nor additional expenses incident to the future exercise of their corporate powers, 30 O. S. 604. No damages recoverable for delay, danger, inconvenience and impairment of hauling capacity of engines stopping before crossing petitioners track, 105 Ill. 110; 388; 44 Am. Rep. 799.

Id. Street slope.—Where the part of an abutting lot is covered by the slope of a fill made in the improvement of a street, the owner is entitled to compensation for the use of such part of his lot, the measure of which compensation would not be the full value of the fee, but the difference in the land without the easement and its full value as burdened with the easement, 3 Bull 560, affirmed, 34 O. S. 276.

Constitutional provisions.—Our constitution provides that "Private property shall ever be held inviolate but subservient to the public welfare. When taken in time of war or other public exigency imperatively requiring its immediate seizure or for the purpose of making or repairing roads, which shall be open to the public, without charge, a compensation shall be made to the owner in money, and in all other cases, where private property shall be taken for public use, a compensation therefor shall first be made in money, or first secured by a deposit of money; and such compensation shall be assessed by a jury, without deduction for benefits to any property of the

owner." Const. 1851. Art. I. § 19. "No right of way shall be appropriated to the use of any corporation until full compensation therefor be first made in money, or first secured by a deposit of money, to the owner, irrespective of any benefit from any improvement proposed by such corporation; which compensation shall be ascertained by a jury of twelve men in a court of record as shall be prescribed by law." Const. 1851. Art. XIII § 5. The constitution of 1802 provided that "Private property ought and shall ever be held inviolate, but always subservient to the public welfare, provided a compensation in money be made to the owner." Art. VIII. § 4.

Under the constitution of 1802, a jury was not necessary, 5 O. 140; 7 O. (pt. 2) 111 and prepayment was not required for property taken for repair of public works, 5 O. 115. No damage was secured for alteration of streets, but the legislature had power to award damages, 8 O. 543. Benefits might be set-off, 14 O. 541; 5 O. S. 140; 251. The state took a fee in canal lands, 34 O. S. 541.

Contracts for right of way may be by parol, 6 Wend. 461, include all damages resulting from proper construction of improvement, 56 Barb. 456; 9 Met. 553; 28 Vt. 99; 111 Ill. 363, enforceable by action for damages on the contract, 63 Mo. 68; 84 N. J. Eq. 55; 2 Cush. 536 or specific performance, 55 Ia. 677; 20 N. Y. 184, not by ejectment after entry and occupation, 20 O. S. 81.

Corporate existence.—Organization and right to condemn must be proven, 15 O. S. 21; 33 O. S. 429. Organization must be proven by certificate of public record, 5 O. S. 276.

Definition.—Eminent domain is the "right of the sovereign without the consent of the owner, when necessary, to make private property "subservient to the public welfare" per Ranney J. 4 O. S. 308, 324. Eminent domain is the right of the government to appropriate otherwise than by taxation and its police authority private property for public use on payment of proper compensation, see Dillon Mun. Corp. 8d. ed. § 584. Eminent domain is distinguishable from taxation in that the latter operates upon the community or upon a class of persons in a community and by some rule of apportionment, while the former operates upon an individual and without reference to the amount or value exacted from any other individual or class of individuals, 4 N. Y. 419; 424; 82 Conn. 118; 8 Mich. 274. Under the power of eminent domain private property can be taken only on the condition of providing compensation therefor, but in the exercise of the police power of the state, private property may be taken or its use controlled without payment of compensation, see 7 Bush. 53, 84.

Description, sufficiency of, 13 O. S. 373. It is not sufficiently definite to place one terminus of a right of way at a point, not designated, on the Ohio and Pennsylvania State line in the county of Trumbull and the other at a point, not designated on the Ohio river in either the county of Brown or Adams, 5 O. S. 276, 279. From a point *near* the north-east corner to a point near the south-west corner, insufficient, 54 Ind. 121. The residence of a person too indefinite a description of a terminus to authorize the location of a highway, 58 Ind. 64. Defective certificate of description, after record, and after company organized and acted under it held not void for uncertainty, 11 O,

S. 516. Presumption of opening of road where surveyed and located, 13 O. S. 373, 381.

Election.—To maintain ejectment or compel condemnation on unlawful entry, 5 Bull 643, to recover compensation and damages under § 6448-6450 or land itself in case of unlawful appropriation, 35 O. S. 531.

Entry.—To survey without compensation, constitutional, 10 W. L. J. 365. Entry without appropriation. Owner may recover compensation and damages, 35 O. S. 531.

Error.—Proceedings in § 6437.

Estoppel.—Owner can not recover value of the land if he has a right to recover the land, 35 O. S. 531, *vice versa* 2 Bull. 5, 18, can not tender deed of land and recover its value, 19 Bull 178. On entry under void proceedings, delay of owner no estoppel against ejectment, 37 O. S. 147. Estoppel by delay or acquiescence to enjoin use of land by railroad after completion or large expenditures made, 18 O. S. 169. When owner not estopped from showing company appropriated more land than necessary, 43 O. S. 229.

Evidence as to amount of damages, etc. The owner is a competent witness to testify in his own behalf, but the opinion of a witness as to the amount of damages is not evidence, 4 O. S. 583; 5 O. S. 568; see 18 Bull 295; 45 O. S.; but he can describe the manner in which the property is affected, and state his opinion as to the value of the property. *Id.*

There seems to be a growing tendency to allow a witness to give an opinion on the amount of damages, Mills on Eminent Domain § 165, citing 67 Pa. St. 415; 47 *Id.* 23; 19 Minn. 464; 111 Ill. 413; 24 Ala. 130; 59 Wis. 364. But, on the trial of an action against a railroad company by an abutting owner to recover damages for injury to his property by the laying of its track, it was held error to permit witnesses against objection to testify how much less per year was received as rent for the property affected since, than before the track was laid in front of it; to give their opinions concerning the amount of damages sustained, and also their opinion as to the "difference in value of the property" with the track in the street, and if it was some other place, 18 Bull 295; 45 O. S.

Id. Expert testimony not necessary. The value of real estate may be proved by other than expert witnesses. Persons living in the neighborhood who have bought and sold property and those who know the land, its availability, fertility, and situation, and the character of similar property may testify to its value, 17 Bull 260; see 20 Bull 8; 17 Bull 31, 328.

Id. Rental value, 20 Bull 8.

Id. Sales of neighboring property are not competent on direct examination, at least unless they are of precisely similar property very near and very recent, and perhaps not even then, but on cross-examination they may be inquired into to test the witnesses' knowledge, Ham. Co. Dist. Ct. cited in Peck's Mun. Corp. 255; referring to, 17 O. 16, 24; see 20 Bull 8. That evidence of such sales is not admissible, 53 Ga. 178; 81 Pa. St. 414; 35 Cal. 247; 19 Minn. 454.

That it is, 5 Md. 314; 6 Allen 115; 60 N. H. 522, when the property is of precisely similar character and the sales recent, 59 Wis. 334; see 53 Ia. 397; 113 Mass. 262; 44 Ark. 258; 103 Mass. 365,

Id. View by jury.—Where a view of the premises was had by a jury in such proceeding the result of the view was held competent evidence for them to consider, and from this evidence they might rightfully fix the value and damages even though their findings might differ from the amount testified to and from the weight of the testimony, 14 N. E. Rep. 19; cited in, 19 Bull 258.

Id. Miscellaneous.—The owner may show that prior to the commencement of proceedings and without knowledge that the land would be sought for that purpose he had laid some of it out in lots, streets and alleys, and had caused a plat thereof to be made ready for record. He may also show that the land when subdivided is more valuable when sold by the acre or for other purposes, and in that connection an unrecorded plat or diagram showing the manner in which such land has been divided, and how such subdivision is affected by the appropriation, is admissible as evidence, not as a valid town plat, but as a scheme or plan for sale affecting the value of the property, 30 O. S. 108.

Account books of persons not parties to proceedings not admissible to prove value of property affected by the appropriation and quantity of products transported over it from the lands of other parties, 33 O. S. 429. Where a civil engineer testified that he had computed the quantity contained in each of the lots described in the application for the appropriation, and had noted the square feet contained in each lot on a copy of the plat contained in the application, which paper the court permitted to be given to the jury as a memorandum of the quantity of land contained in each one of the lots, as testified to by the witness, this was held not to be error, 32 O. S. 215. Statement in application sufficient evidence of line of road, 33 O. S. 429.

Where compensation is claimed for the location and construction of a railroad between coal mines and a navigable river on the land owner's premises whereby the conveniences of the river transportation for the coal to market was injured or cut-off it is competent for the railroad company to show that the river transportation in connection with the coal banks had ceased to be valuable or became of less value by means of the facilities for coal transportation afforded by the railroad for the purpose of reducing damages, 5 O. S. 568. It may be shown that the property is mining property with a prospective value as mining property though no ore has yet been produced, 17 Bull 260.

If proper question is rejected on objection by plaintiff in error, similar testimony already given by him may also be struck out, 33 O. S. 429.

Tax assessors valuation not admissible, 44 Ark. 258; 5 Gray 35.

Fences.—Agreement to withdraw from jury claims for fences not within statute of frauds, 21 O. S. 235. Railroad may use owner's partition fence, 28 O. S. 214. Owner can not maintain ejectment on failure of company to put up fence according to agreement, 20 O. S. 81.

How much may be taken.—Only so much property may be taken as will answer the public wants, and this can be held only so long as it is used by the public, and can not be diverted to any other purpose, 4 O. S. 308. See § 2232; 5 O. 391.

Improvements made during unlawful occupation belong to owner and must be paid for on subsequent condemnation, 36 Ind. 463; 39 Ia. 340; 6 N. Y. Sup. Ct. 298; 47 Cal. 515; unless the owner acquiesced in their construction, 26 Minn. 66; 75 Ill. 176; 100 Ind. 409. Other authorities hold that the land owner is not entitled to compensation for such improvements, 63 Miss. 380; 111 Ill. 273; 18 Alb. L. J. 171; 87 Pa. St. 28; as the corporation still has the right to acquire the land under legal proceedings and can not therefore be considered as a trespasser at common law; see 10 Cent. L. Jour. 101, 315.

Inability to agree must be shown, 33 O. S. 429; appear of record, 32 Mich. 283; 79 N. Y. 69; 61 Mo. 33; should be according to the statutes of some states alleged in the petition, 28 Cal. 662; 101 Ill. 333. The burden of proving inability to agree is on the condemning company, 5 N. Y. 434. Inability to agree means that the owner must be either unwilling to sell at all or willing to sell only at a price so large as in the good judgment of the agents of the corporation to be considered excessive, 67 N. Y. 371; see 32 Conn. 452; 34 Id. 78. Agreement in respect to different part of property no defense, 2 Bull 187.

Injunction.—Owner can not stipulate to be entitled to in case of failure of company to fulfil its contracts after entry has been made, 10 O. S. 372. A change of use from a canal to a railroad if acquiesced in by the owner, can not give such owner a right to an injunction to prevent the operation of the road, the remedy must be at law, 18 O. S. 169. Generally, § 6450.

Interest.—Where the condemning company pays into court the damages assessed and takes possession of the property, and upon petition in error the assessment is set aside, and a new assessment awarded, it is competent for the jury in making the latter assessment to allow and include in their verdict interest from and after the time when possession was taken, and while the money was retained by the court, 21 O. S. 334. Interest not allowable where possession not taken, see 5 Bull 789; 9 Rec. 310. See § 2260 n.

Jurisdiction.—Act 1852 giving probate court jurisdiction constitutional, 4 O. S. 308. Probate court's jurisdiction special and limited, 11 O. S. 497. The whole proceeding is substantially *in rem* and jurisdiction of the person of the parties unnecessary, 19 O. S. 173.

Land once appropriated may be condemned for public use, 18 O. S. 92; 23 O. S. 510; 7 W. L. J. 251, 265. Must not be inconsistent with first use, 4 Bull 201; unless such appears by express words or by necessary implication to be the legislative intent, 23 O. S. 510. Such implication arises only when requisite to the enjoyment of the powers expressly granted and can be extended no further than such necessity requires, Id. 523. Right to use another track, compensation prescribed by city council, 36 O. S. 239.

License to enter without damages may be revoked before being acted on, 22 Pick. 33; not after, 5 N. Y. 568; see 40 Pa. St. 53; 45 Ga. 531; 32 L. J. (Exch.) 236; 20 L. J. (Q. B.) 486.

Limitation.—Second condemnation, § 2260. Costs and expenses, § 6435. Petition in error, § 6437.

Mandamus refused to compel payment of verdict, 17 O. S. 103; 22 O. S. 534. Officer compelled by to draw proper vouchers, 26 O. S. 109.

Necessity for appropriation.—The legislature determines this question, 5 Paige Ch. 137 (28 Am. Dec. 416); 30 Cal. 437; 16 Kas. 117; 6 Allen 353; 98 N. Y. 139; but it may delegate the power of determining this question to the courts, 2 Bull 187 (Act 1875); or to the individuals or corporations who are authorized to appropriate the property, 21 N. Y. 595; 32 Pa. St. 169; 71 Ill. 333; the quantity of ground required, 19 O. S. 299. Necessity of appropriation presumed no abuse being shown, 2 Bull 142.

Notice of application to condemn must contain a copy of the application, 11 O. S. 219. The rule of strict construction applied, *Id.* If notice is defective there is no jurisdiction, 46 Mich. 190. Where proceedings are void for want of notice, the owner is not required to proceed to reverse the proceedings on error, but may bring his action for damages against the company, 1 D. 316. Personal notice to owner of land sought to be taken for a ditch not indispensable, 19 O. S. 173. Owners of unrecorded conveyances, etc., can not complain of want of notice, 98 Mass. 491; 42 Ia. 173. Mortgagee whose mortgage is recorded entitled to notice under § 2237; 1 C. C. R. 49. Waiver of, by appearance, 65 N. Y. 452; 46 N. H. 64; 16 Pick. 217; without objecting to sufficiency of, 9 Barb. 449; 2 Pick. 430; 11 N. H. 293; by taking an appeal, 31 Minn. 239; from award of commissioners, 28 Kas. 470; objection to notice can not be made for first time on appeal, 24 Ind. 454. Appearance and objection to juror, 12 N. Y. 190; or in answer to subpoena to appear as witness, 20 Wend. 186; held not a waiver.

Parties.—Trustees of Southern Railway may institute proceedings to condemn, though land leased to another corporation, 9 Bull 32. Lessee held not necessary party in proceedings to condemn right of way over lessor company, 16 Bull 109.

Parties entitled to compensation.—*Vendor and vendee.*—Vendee pending proceedings takes subject to award, not entitled to notice of subsequent proceedings, 49 Wis. 449; but may intervene and object to irregularities, 15 Ark. 43. Damages for taking and injury belong to owner at time of injury and do not pass to subsequent vendee, 54 Ga. 293; 100 Ind. 409; 77 Pa. St. 392; 65 Me. 591; 11 Bull 288; 15 S. C. 476.

Id. Heirs.—Revivor in name of, 29 O. S. 633. When land is taken before death of owner administrator entitled to damages, 36 Barb. 600; 61 Me. 298; though before filing petition for damages, 8 Cush. 274; the heir, if taken after owners' death, 4 Cush. 467; unless administrator had right to sell for payment of debts, *Id.*; 41 Vt. 579; 25 N. H. 458.

Id. Mortgagee.—An owner entitled to notice under § 2237; 1 C. C. R. 49, 54. Some cases hold damages should be paid to mortgagee, 44 N. Y. 192; 5 Wend. 603. Others to mortgagor, 5 Gray 470; 7 Serg. & R. 411; 126 Mass. 427; changed by statute in Massachusetts. See 1 C. C. R. 49, 54.

Id. Rights of lessee protected, 10 Md. 76; 25 Pa. St. 229; 66 *Id.* 425; 3 Jones & S. 461. Liability to pay rent subsists notwithstanding appropriation of leasehold, 11 O. 408; and eviction under condemnation proceedings is no defense to an action for rent, 2 Bull 95. Landlord and tenant considered as one owner under statute allowing separate trials to each owner, 91 U. S. 367; but see § 6422. Lessee from

year to year an owner, 11 R. I. 258, 372. Lessee of land at time of passage of order to take it to widen a street entitled to damages though his lease terminated before the actual taking, 108 Mass. 535. Rent apportioned when part of land condemned, 15 Wend. 464, 23 Mo. 597; 38 *Id.* 143. Other cases hold rent not apportioned but lessee may claim damages in amount equal to rent 20 Pick. 159; 23 *Id.* 425; 11 O. 408, 66 Pa. St. 425.

Id. Dower rights, 19 Wend. 679, 35 N. J. L. 558; 46 Miss. 1. Inchoate dower may be taken during life of husband on paying him full compensation. 8 N. Y. 110. See 3 O. 24.

Id. Life tenant and remainderman may join, 2 Head. 171; 13 Pa. St. 497. Remainderman can not maintain ejectment during existence of life estate though damages have not been paid, 45 Vt. 215.

Id. Judgment-creditor. - It has been held that payment of compensation to owner passes title free of judgment liens, 47 N. Y. 157; 59 Ind. 446.

Pleading. - Where a petition stated only that a railroad company in locating and constructing its road on and through the plaintiff's land *appropriated* about two acres of the land to its own use and located its road through the land in a diagonal manner so as to greatly injure the same and committed other acts and trespasses upon the land to the plaintiff's damage of \$150. It was held that it did not state facts sufficient to constitute a cause of action, 10 O. S. 568. Petition should disclose use for which lands outside of railway are appropriated, 34 O. S. 114. Petition for condemnation by railroad under Act 1848 must describe the entire tract of land and not the part taken only and must fix the grade so as to show the extent of damage, 7 W. L. J. 392; *contra. Id.* 274. Plea averring payment before commencement of suit for trespass bad. Averment should be of payment before entry on the land, 10 W. L. J. 365 (Act 1848.)

Power strictly construed. - The power of eminent domain must be strictly construed and if there is a reasonable doubt whether the legislature intended to grant the power claimed, the doubt is to be resolved against the power; and this power should never be taken to be delegated by doubtful implication, 16 O. S. 390, 396; 20 O. S. 496; 17 O. 340, 353; 2 O. S. 235; 11 O. S. 228; 43 O. S. 228. Railroad company can not condemn on changed route. *Id.*; unless authorized, 15 O. S. 21, can not condemn temporary right of way while constructing main track, 11 O. S. 228. Notice, see 11 O. S. 219.

Public use - The power can only be exercised in behalf of a public use 5 O. 391; 7 O. (pt. 1) 217. The question as to what is a public use is always one of law, 34 Ala. 311; 51 Cal. 269; 35 Mich. 333; 66 N. Y. 569.

The judgment of the legislature will, however, be respected by the courts, though it is not conclusive, Dillon Mun. Corp. § 600.

Land taken for a toll bridge is taken for a public use, 5 O. 485; township road, 4 O. S. 494; 5 O. S. 109; township ditches and drains, 20 O. S. 319; by railroad for depot, 4 O. S. 308; or side tracks, 16 O. S. 833; by State for canal, 4 O. 253; or by private corporation, 7 O. (pt. 2) 111. Not for toll house without line of road, 11 O. 392. Toll house may be erected within line,

6 O. S. 15. Railroad can not condemn for wharf, 19 O. S. 209. (Act 1848.) Land could not under Act 1856 be condemned to construct railroad from mine to another railroad, 19 O. S. 560. Statutes authorizing the construction of such roads have been upheld when the roads were open to the public.

Right of eminent domain may be exercised for transportation of natural gas, oil or water, § 3878; to condemn avenues belonging to avenue companies within corporate limits, § 3826; a R. R. Co's., § 3281; Cemetery Co's., § 3573; Hydraulic Co's., § 3563; Magnetic Telegraph Co's., § 3456; limitation, § 3457; Plank road Co's., § 3475; St. R. R. Co's., § 3440.

Railroad in street or highway.—Owner of fee in highway can compel company to appropriate its right of way, 85 O. S. 168. Horse railroad in street changing grade an additional burden entitling abutting owner to compensation, 14 O. S. 523; steam road, 40 O. S. 498. Construction of steam railroad in street enjoined until right acquired under condemnation proceedings. Immaterial in such case whether fee is vested in city or abutting owners, 88 O. S. 41. See Compensation, etc., *supra*.

Reversal of condemnation, after possession taken, owner may recover land, 37 O. S. 147. Delay without proof of knowledge or acquiescence no bar, *Id.* Re-trial of question of compensation on reversal notwithstanding payment of first award, 17 Bull 319. Case must be remanded on reversal, 8 Bull 965. § 6438 provides that if common pleas reverse judgment of probate court, it shall retain the cause for trial, etc.

Revivor must be in name of heirs or devisees and not administrator of deceased, 29 O. S. 633.

Second condemnation.—Allowed after six month's failure to pay and take possession, 42 O. S. 239; see § 2260.

Separate trial.—§ 6422.

Statutory remedy exclusive.—8 O. S. 38, 39; 4 O. S. 685; 8 O. S. 590; 18 O. S. 229, excludes actions of trespass or for damages. *Id.*

Surplus land can not be sold by condemning road to another company, and the latter must pay the land owner for it when used, 43 O. S. 228.

What interest in land can be taken.—The city acquires a fee in land appropriated, 2 Bull 5, 18. Under the constitution of 1802, the state took a fee in canal lands, 84 O. S. 541. The appropriation act of 1848 gave but an easement, 43 O. S. 228. The legislature may provide for the quantity of interest to be taken, 84 O. S. 541; 28 O. S. 643. In any case, however, an easement would be taken, unless the statute plainly contemplated and provided for the appropriation of a larger interest. Cooleys Const. Lim. 693, citing 6 Pet. 498; 6 Mass. 90; 25 Vt. 150; 15 Johns 447.

What property may be taken.—Legal and equitable rights of every description, excepting money "or that which in ordinary use passes as such, and which the government may reach by taxation, and also rights in action which can only be available when made to produce money," Cooley's Const. Lim. pp. 652, 3.

What constitutes a taking.—Changing established grade of

street, 15 O. 474, s. c. 13 O. 229; 7 O. S. 459; laying horse railroad in street, altering existing grade and impairing access to building thereby, 14 O. S. 523; laying gas pipes in street, 16 Bull. 121; erecting telegraph, 2 C. C. R. 259, (citing cases), or electric light poles in street, 9 Bull. 65; changing highway to plank road is not, 2 O. S. 419 nor State canal to public highway, 28 O. S. 643.

§ 6415. When appropriations can be made. Appropriations can only be made when the corporation is unable to agree with the owner, or his guardian or trustee, as to the compensation to be paid for the property sought to be appropriated, or when the owner is incapable of contracting in person or by agent, and has no guardian or trustee, or is unknown, or his residence is beyond the state, or unknown. [69 v. 88, § 2.]

Right of way not secured by deed of guardian without authority from probate court, 39 O. S. 58.

§ 6416. Petition for appropriation filed in probate court. In any such case the corporation may file with the probate judge a petition, verified as in a civil action, containing a specific description of each parcel of property, interest, or right, within the county, sought to be appropriated, the work, if any, intended to be constructed thereon, the use to which the same is to be applied, the necessity for the appropriation, the name of the owner of each parcel, if known, or if not known, a statement of that fact, the names of all persons having or claiming an interest, legal or equitable, in the property, so far as the same can be ascertained, and a prayer for the appropriation of the property. [69 v. 88, § 2, 19.]

§ 6417. Petition may include one or more parcels—In what county to be filed. The petition may include one or more of the parcels of property, rights or interests in the county in which it is filed; and when any such parcel, right or interest is situated in two or more counties, the petition may be filed in either of the counties in which an owner is resident, and if no owner is resident therein, it may be filed in either. [72 v. 71, § 1.]

Proceedings may be instituted jointly against all the owners of property lying in the county and sought to be appropriated, but after the return of the jury from the view, each owner of

distinct property is entitled to a separate trial, 4 O. S. 308; see § 6422.

§ 6418. **Summons, its command and service thereof—Alias summons.** Upon the filing of a precipe therefor, the probate judge shall issue summons for the owners, and persons named in the petition as residents of the state and having an interest, which may be directed to the sheriff of any county, and shall command him to notify the persons named therein of the filing of the petition, and to appear thereto at a time to be fixed by the judge, and named therein, not less than five nor more than fifteen days from the date thereof, and which shall be served and returned as in a civil action. When a writ is returned "not summoned," other writs may be issued, until the parties are duly summoned. [72 v. 71, § 1.]

§ 6419. **Service by publication, how proved.** When a person having an interest is unknown, or his residence is beyond the state, or unknown, the corporation may make service by publication against him, by publishing in a newspaper of general circulation in the county where the petition is filed, for four consecutive weeks, a notice containing a summary statement of the object and prayer of the petition, so far as it relates to the property of the person thus to be notified, the court in which it is filed, and the time when such person is to appear thereto, not less than ten nor more than twenty days after the last publication; and the fact of publication may be proved by the affidavit of any person knowing the same. [72 v. 71, § 1.]

§ 6420. **Jurisdictional questions—when to be heard and determined—burden of proof.** On the day named in any summons first served, or publication first completed, the probate judge shall hear and determine the questions of the existence of the corporation, its right to make the appropriation, its inability to agree with the owner, and the necessity for the appropriation. Upon these questions the burden of proof shall be upon the corporation, and any interested person shall be heard. [72 v. 71, § 1.]

§ 6414n. *Corporate existence.* See before this statute, 88 O. S. 429.

§ 6421. Jurors to be drawn from box and venire issued. If the judge determine these questions for the corporation, as to any or all of the property, and persons interested therein, he shall issue an order to the clerk and sheriff to draw sixteen names from the jury box, as in other cases, and within two days after the receipt of the same, they shall execute the order, and the clerk shall forthwith return it to the probate judge, with a list of the names drawn indorsed thereon; and the judge shall issue to the sheriff a venire for the jurors so drawn to attend at his office, at a time to be fixed by him, and named in the writ, not exceeding ten days from the date thereof, which shall be served and returned as in other cases. [72 v. 71, § 3, 4.]

§ 6422. Separate owners entitled to separate trial—they hold the affirmative on trial. The owners of each separate parcel, right, or interest, shall be entitled to a separate trial by jury, verdict, and judgment. They shall hold the affirmative on the trial, which shall be conducted, and evidence shall be admitted, and bills of exception may be taken, as provided in civil actions. [69 v. 88, § 8, 12, 23; 72 v. 71, § 1, 3.]

The word "jury" in § 19, Art. I of the constitution as well as where it occurs in other places in that instrument means a jury of twelve men, 4 O. S. 167. Each owner of distinct property is entitled to a separate trial, 4 O. S. 308; but each owner of an estate or interest in each parcel is not, 91 U. S. 367 (69 v. 91), see § 2247*n*. Municipal corporations. Right of additional counsel to appear after jury sworn, 19 Bull 258: see as to number of counsel, § 2245.

§ 6423. Amendments allowed. The court may amend any defect or informality in any of the proceedings authorized or required by this chapter, or cause new parties to be added, and direct such further notice to be given to any party in interest as it deems proper. [69 v. 88, § 17.]

§ 6424. Time of trials—adjournments, discharge of juries. The court may direct the order and fix the time of the several trials; may adjourn or continue any trial for the purpose of obtaining proper service upon any property owner, or when deemed necessary for the proper and convenient trial of the several

cases; and may discharge any jury, and cause other juries to be impaneled, as provided in this chapter. [72 v. 72, § 3.]

§ 6425. **How panel to be filled: jurors to be interrogated by court.** When, by reason of non-attendance, sickness, or other cause, any of the sixteen persons are not present and in condition to serve as jurors, the judge shall order the sheriff to fill the vacancies with talesmen; and when the list of sixteen is full, the judge shall call upon each separately, beginning with the first named on the list, to take his place in the jury box, and shall personally inquire of each, as called, whether he is interested in any way in any of the property, rights, or interests sought to be appropriated, or in the corporation which filed the petition, either as owner, stockholder agent, attorney, or otherwise; and if such person answer in the affirmative, or if it be shown to the judge, by satisfactory evidence, that he is so interested, he shall be excused from serving on the jury, and the next person on the list shall be called, and interrogated in like manner; and if the list of sixteen be exhausted before a proper jury of twelve men is taken and accepted therefrom, the judge shall order the sheriff to fill the remaining vacancies in the jury box required to make up the number of twelve, with talesmen, who shall be interrogated as herein above provided. [72 v. 73, § 4.]

§ 6426. **Challenge to jurors and how vacancies filled.** When the jury box is filled with twelve disinterested jurors, the owners of the property which is the subject of the trial, jointly, and the petitioner, shall each have the right to two peremptory challenges, and to challenge for cause; and all vacancies arising in the jury from challenge, or otherwise, shall be filled by talesmen having the qualifications prescribed in the last section, to be ascertained as therein provided. [72 v. 73, § 4.]

§ 6427. **Oath to be administered to jury.** When the jury is filled, the probate judge shall administer to them the following oath: "You, and each of you, do solemnly swear that you will justly and impartially assess, according to your best judgment, the

amount of compensation due to the proper owners in the cases which will be brought before you in this proceeding, by reason of the appropriation of their property described in the petition, to the use of [here name the corporation], in the proceeding now pending, irrespective of any benefit from any improvement proposed by such corporation; and you do further swear that you will, in assessing any damages that may occur to such property owners, by reason of the appropriation, other than the compensation, further ascertain how much less valuable the remaining portion of said property will be in consequence of such appropriation; this you swear as you shall answer to God." [72 v. 73, § 5.]

See § 6414 *n. Benefits.*

§ 6428. The form of writ to sheriff. The probate judge may, upon motion of either party, issue the following writ to the sheriff, to wit: "*To the sheriff of ——— county:* You are hereby commanded to conduct the twelve jurors named in the panel to this writ annexed, to view the property or premises sought to be appropriated by [here state the name of the corporation], and owned by [here state the name of the owner or owners]. on ———, the ——— day of ———, then and there to view the premises or property aforesaid, [in the presence of A. B. on the part of the corporation aforesaid], and C. D. on the part of the owner, appointed by this court, and you shall make return of the manner you have executed this writ to this court, on the ——— day of ———, A. D. ———." The writ shall be signed by the probate judge, and certified under his seal of office. [69 v. 88, § 9.]

19 Bull. 258; § 6414 *n. Evidence.*

§ 6429. Judge must deliver to sheriff description of property—may appoint persons to be present at view—certificate of sheriff—expense of view—no evidence given thereon. The judge shall also deliver to the sheriff a copy of that part of the petition containing a separate description of each parcel of property, and rights or interests sought to be appropriated within the county, which the jury is required to view; he may appoint,

to be present at the view, the two persons named in the writ; and the sheriff who is to execute the writ shall, by a special return upon the same, certify under his hand that the view has been made according to the command thereof. The expenses of taking the view shall be taxed in the bill of costs, and no evidence shall be given on either side at the taking thereof. [69 v. 88, § 9.]

§ 6430. **Witnesses may be examined before jury.** Witnesses may be examined before the jury after its return to the court; but if more than three witnesses be examined by either party, on the same point in the same case, the judge may tax the costs of such additional witnesses to the party calling them. [69 v. 88, § 9.]

See § 6414 *n.* *Evidence.*

§ 6431. **When a structure is partly on land sought to be appropriated.** When a building or other structure is situated partly upon land sought to be appropriated, and partly upon adjoining land, and such structure can not be divided upon the line between such two tracts of land without manifest injury, the jury, in assessing the compensation to any owner of the lands, shall assess the value of the same exclusive of the structure, and make a separate estimate of the value of the structure; the owner of the structure may elect to retain the ownership of the same, and to remove it, or accept the value thereof as estimated by the jury; if he fail to make such election within ten days from the date of the report of the jury, or within ten days from the termination of the cause in any higher court to which it may be taken, he shall be deemed to have elected to retain and remove the structure; but if he elect to accept the value of the structure, the title thereto shall vest in the corporation making the appropriation, which shall have the right to enter upon the land for the purpose of removing the structure therefrom. [73 v. 210, § 1.]

§ 6432. **Verdict—Motion for new trial—Confirmation of verdict.** The jury shall render its verdict in writ-

ing, signed by the foreman, to the judge, who shall cause it to be entered of record; and unless for good cause shown, upon motion to be filed within ten days after the verdict is rendered, a new trial be granted, the judge shall enter a judgment confirming such verdict. [72 v. 71, § 10.]

There must be judgment on the verdict before possession can be taken, 38 O. S. 32.

§ 6433. When and how corporation may have possession. Upon payment to the party entitled thereto, or deposit with the probate judge, of the amount of the verdict and such costs as have lawfully accrued in the case up to the time against the corporation, the corporation shall be entitled to take possession of, and shall hold, the property, rights or interests so appropriated, for the uses and purposes for which the appropriation was sought, as set forth in the petition, and the judge shall enter of record an order to that effect, and if necessary, proper process shall be issued to place the corporation in possession thereof. [72 v. 71, § 10.]

After such deposit, the title passes, and no refusal on the part of the owner or protest will constitute the condemning party a trespasser, 4 O. S. 655.

§ 6434. When and how corporation may abandon proceeding. The corporation may abandon any case or proceeding after paying into the court the amount of the defendant's costs, expenses, and attorney fees, as found by the court. If the corporation fail in any case to make payment or deposit, as provided in the preceding section, within thirty days after confirmation of the verdict, the probate judge, on motion of the party entitled to such payment, to be filed within ten days after the expiration of said thirty days, shall enter an order directing the corporation to make such payment or deposit within thirty days after the date of such order; and unless such corporation, within said thirty days, make such payment or deposit, it shall be held and considered to have thereby abandoned the property, rights or interests so appropriated, and all claims thereon under its proceeding, and the judge shall issue an order to that effect; the

judge shall also enter a judgment against the corporation, and in favor of the party entitled to such payment, for such amount of expenses, including time spent, and attorney fees incurred by him in the proceeding, as the court, upon the evidence offered in that behalf, deems just and reasonable, for which execution may be issued against the corporation, and the directors of the corporation, individually, shall be liable upon such judgment, and may be made parties thereto by action. [72 v. 71, § 10.]

Sec § 6414, n.

§ 6435. When action may be brought for costs and expenses. If such judgment be not satisfied within thirty days after the rendition thereof, or if the party entitled thereto be not satisfied with the amount thereof, such party shall have a right [of action] against the petitioner for his expenses aforesaid, including time spent, and attorney fees, and also for his expenses, including reasonable attorney fees, incurred in prosecuting such action; but the action shall be brought within six months after the rendition of the judgment in the probate court. [72 v. 71, § 10.]

§ 6436. New trial. Proceedings thereon. Costs. A new trial shall be granted for cause only, shall take place in the same court where the first trial was had, and shall be conducted in accordance with the provisions of this chapter for the first trial, so far as they are applicable; and upon the granting of the motion for a new trial, if the amount of the first verdict has been paid into court, the probate judge shall retain the same until the final termination of the second trial; but if, upon the new trial, the verdict of the jury exceed the amount of the first verdict, the corporation shall pay the amount of the first verdict, together with the excess, to the owner of the property, and if the verdict upon the second trial be less than that of the first, the probate judge shall repay to the corporation the difference. If a new trial be granted at the instance of the owner of the property, and the verdict of the jury be the same or less in amount

than that first rendered, the owner shall pay the whole costs of the second trial; and if it be more than that first rendered, the costs of the second trial shall be paid by the corporation. [69 v. 88, § 11.]

§ 6437. **Petition in error may be filed by either party in common pleas, when. When corporation may enter on land notwithstanding.** Either party may file a petition in error in the court of common pleas of the proper county, within thirty days from the rendition of the final judgment in the probate court, and the proceedings in error shall be conducted as in civil actions; but the corporation may, on the rendition of the final judgment in the probate court, pay into said court the amount of the judgment for compensation and costs therein rendered, and proceed to enter upon and appropriate the property, notwithstanding the pendency of the proceedings in error. [69 v. 88, § 12.]

Limitation of thirty days applies to proceedings by or against the owner and need not be pleaded, 35 O. S. 247; see 19 O. S. 279. Limitation, (15 days, Act 1852) is not by implication superseded by § 6723. 10 O. S. 25. Common pleas can not render final judgment on error from probate court, 35 O. S. 247. Under § 6437-8 cause may be retained for trial and final judgment, 39 O. S. 170. Probate judge can not pending proceedings in error retain condemnation money, if possession has been taken by company, 23 O. S. 627.

§ 6438. **Proceedings in common pleas on error. Costs.** If the court of common pleas, upon the hearing of the cause, affirm the judgment of the probate court, all the costs in the court of common pleas shall be paid by the plaintiff in error; and if it reverse such judgment, it shall retain the cause for trial and final judgment, as in other cases, which trial shall be had at the term of reversal of the judgment, unless for good cause shown by either party the court grant a continuance; and on the trial of the cause in the court of common pleas, the same inquiry shall be made as to the interest of the jurors, and the same oath shall be administered to the jury as is provided for in § 6425, 6427. [69 v. 88, § 13.]

§ 6439. **School lands, how appropriated.** When a railroad company, incorporated in this state, has located its railroad through any part of reserved sec-

tions twenty-nine or sixteen, or through any part of sections granted by congress in lieu of section sixteen, for school purposes, and such lands remain unsold, or through any town lot or parcel of ground used for or devoted to school purposes, it may appropriate so much of such land or lots as may be necessary for the purposes aforesaid; and service of the summons made on such trustees or school officers as have possession or control of the lands, shall have the same force and effect as service in any other case on owners of land sought to be appropriated. The money arising from such appropriation shall be disposed of by such trustees or school officers in accordance with law. [69 v. 88, § 14.]

Sec § 6448.

§ 6440. When probate judge interested, proceedings to be commenced in common pleas Special term of. When the probate judge is interested, either as stockholder, director, or otherwise, in a corporation seeking to appropriate private property to its use, the proceedings authorized by this chapter may be commenced in the court of common pleas of the county; and in that case the proceedings shall conform in all respects, so far as applicable, to the provisions of this chapter, and all the powers conferred and duties imposed thereby upon the probate court shall devolve upon the court of common pleas; and said court may make such orders, and direct such proceedings to be had, as may be necessary to do full justice between the parties, according to the true spirit and intent of this chapter; and after final judgment the corporation may, on depositing the amount of the judgment and costs assessed in said court, with the clerk thereof, be entitled to enter into possession of the property sought to be appropriated. In case such court is not in session when the proceedings are commenced therein, nor on the day fixed for the inquiry and assessment of compensation, a special term thereof shall be held in the same manner as provided in § 2239 of said statute. [80 v. 218.]

§ 6441. Court to appoint attorney for party absent or under disability. When a party in interest is unknown, or his residence is unknown, and when service has been made by publication, and the party has not appeared in the proceedings by agent or attorney, or when such party in interest is under any legal disability, and has no legal guardian, or trustee, within the county where the action is brought, the court shall appoint some competent attorney to attend upon the proceedings, and protect the rights and interests of such party; and the court shall fix the amount of the fees of the attorney for such service, which shall be payable out of any money paid on the judgment rendered in such case for property appropriated. [69 v. 88, § 16.]

§ 6442. Conflicting claims not to be passed upon. When there are diverse or conflicting claims, legal or equitable, to the real estate, or any interest therein, sought to be appropriated under the provisions of this chapter, the jury or court shall not pass upon the same in the proceedings for appropriation, but such claims shall be reserved for adjudication as hereinafter provided. [69 v. 88, § 18]

Action brought, issue joined, neither party being in possession is triable by court without jury, 41 O. S. 606; and either party may appeal from adverse final judgment of common pleas, *Id.*

§ 6443. Conflicting claims adjudicated in common pleas—petition therefor—disposition of fund. Upon the payment of the money into court by the corporation, a party claiming a legal or equitable interest in the property, or the money arising therefrom by such appropriation, may file his petition in the court of common pleas of the proper county, making the other claimants to the property or money parties thereto, setting forth the facts on which the claim is founded, the fact of the appropriation of the property, the amount of money so paid in therefor, and such other facts as are proper to enable the court to hear and determine the matter between the claimants; and the court shall forthwith appoint some master of the court, or other suitable person selected by the parties, to

hold and safely keep such fund, or invest the same in the manner the court shall direct, after hearing the parties; and such fund shall thenceforth represent the land, and the interests therein, and be subject to the control of the court having jurisdiction of the case, by orders entered in the action, according to the rights of the parties to the land or fund, as from time to time the court may determine. [69 v. 88, § 19.]

§ 6444. **Such proceeding a civil action.** Such proceeding in the court of common pleas, shall be considered and held to be a civil action; and the conflicting claims of parties to the fund aforesaid shall be determined by the court, or by a jury trial, according as the claim is equitable or legal, in the same manner as if the land had not been converted into money. [69 v. 88, § 20.]

§ 6445. **Unfinished road bed of railroad company may be condemned. Proceedings therein—answer of defendant company—service by publication.** Any railroad corporation of this state may condemn and appropriate to its own use the interest and easement in and quiet title to any unfinished road bed, or part thereof, lying within the state, and on the line of its proposed road, owned or claimed by any other railroad company or companies, person or persons, partnership or corporation, when such road bed, or part thereof has remained, or shall hereafter remain, in an unfinished condition, and without having the ties and iron placed, and continued thereon for the period of five years or more, immediately preceding the commencement of proceedings to condemn or appropriate the same as herein authorized, and every such company or companies, person or persons, partnership or corporation shall be made a party defendant to such proceedings to condemn or appropriate the same, and shall be required to answer therein setting forth fully its or their title to or interest in such road bed, or part thereof so sought to be appropriated or condemned, if any, it or they may claim, to which answer the plaintiff shall plead issuably, unless it admit the validity of the defendants claim; and in such case if

such defendant be a non-resident of this state, or a foreign corporation, service of summons may be made by publication under subdivision 3 of § 5048 of the Revised statutes of Ohio, and that the terms company or companies, as used in this chapter, shall be held to embrace also person or persons, partnership or corporation as used in this section. [79 v. 65.]

§ 6446. **Judgment and costs in such case—when jury to determine amount of compensation.** When it is determined by the court, upon issue of law, or by the jury upon issue of fact, or by the admission of the pleadings, or by reason of failure to plead that any such company asserting such ownership or claim is not entitled thereto, judgment, including costs, shall be rendered accordingly; but when it in like manner is determined that any such company has an interest in such road-bed, or part thereof, so sought to be appropriated, the jury shall determine and state the amount of compensation due to such company, according to law, on account of the appropriation of such interest. [72 v. 71, § 9.]

§ 6447. **In what courts such proceedings may be commenced and how conducted—case may be taken out of its order: proceedings in error—provisions as to viewers not to apply—sworn statement of president of intention to complete road—25 per cent. of cost of completion to be expended within a year—words “road-bed” include what.** Proceedings under this act may be commenced in the probate court, the court of common pleas or the superior court of any county in this State in which such road-bed or part thereof so sought to be appropriated or condemned may be situated; all or part only of such road-bed, within this State may be included in one proceeding, and when, such proceeding is commenced in the court of common pleas or superior court, the same proceedings shall be had as is prescribed in this chapter for the conduct of the same in the probate court, so far as the same may be applicable to such common pleas or superior court, and not excepted in this section, and the case shall, on motion, be taken out of its order by the court or by any reviewing court and determined without any unneces-

sary delay ; and proceedings in error to such common pleas or superior courts, may be commenced directly in the supreme court, but the provisions of this chapter as to viewers shall not apply to appropriations authorized by such sections, and when any railroad corporation shall commence proceedings under this act, the president of said corporation shall make, subscribe and file in the court where any such proceeding is had, a statement under oath, declaring that it is the *bona fide* intention of said corporation to complete and operate a railroad on the road-bed so sought to be appropriated ; and if said corporation shall for a period of one year after it shall have acquired right to occupy the road-bed, fail to expend in and about the completion of a railroad thereon a sum equal to twenty-five per centum of the total cost of completing the same, to be estimated by the commissioner of railroads and telegraphs, then and in such case the said road-bed shall be open to appropriation and condemnation under this act by any other railroad corporation. The words road-bed used in this act shall be held to include right of way, depot grounds and other easements connected therewith, and it shall be sufficient in the petition and proceedings under this act to designate the road-bed as the road-bed of the railroad corporation by which the route of the road was located and established with the terminal points within which appropriation is sought. [79 v. 65.]

§ 6448. When land owners or school officers may notify corporation to institute proceedings ; petition on failure of corporation to act. When a corporation, authorized by law to make appropriation of private property or the land named in § 6439 of this chapter, has taken possession of, and is occupying or using the land of any person, or the land mentioned in said § 6439 for any purpose, and the land so occupied or used has not been appropriated and paid for by the corporation, or is not held by any agreement in writing with the owner thereof, or the trustees or school officers, having possession or control of the lands named in said § 6439, such owner or owners, or either of them, or said trustees or school officers, may serve notice, in

writing, upon the corporation in the manner provided for the service of summons against a corporation, to proceed under this chapter to appropriate the lands, and on failure of such corporation for ten days so to proceed, said owner or owners, or said trustees or school officers may file a petition in the probate court of the proper county setting forth the fact of such use or occupation by the corporation, that the corporation has no right, legal or equitable, thereto, and in cases of reserved sections sixteen (16) and twenty nine (29), or any part of sections granted by congress in lieu of section 16, for school purposes, named in § 6439, no right, legal or equitable derived from the trustees and officers named therein, that the notice provided in this section has been duly served, that the time of limitation under the notice has elapsed, and such other facts, including a pertinent description of the land so used or occupied, as may be proper to a full understanding of the facts. Such owner or owners, or such trustees or school officers, intending to institute said proceeding, may demand, in writing, from the president or chief officer of such corporation a specific description of each parcel of land so used or occupied without appropriation by it, of the work, if any, constructed or intended to be constructed thereon, and the use to which the same is to be applied, and upon failure of said corporation for ten days to furnish the same, as fully and completely as would be required of it in proceeding under § 6416, the fact of such demand and failure may be alleged in the petition in such proceeding, and on notice to the corporation and proof thereof being made to the probate judge having jurisdiction of such appropriation, he shall restrain said corporation from the use and occupation of said land until said demand has been complied with, or such owner or owners, or said trustees or school officers may cause the necessary surveys to be made therefor, and the costs thereof shall be taxed to said corporation in said proceeding. [80 v. 114.]

§ 6449. Summons in such case; judgment and execution. A summons shall issue, and be served upon the

corporation, and thereafter the proceedings in said court shall be conducted to final judgment, in all respects, as provided in this chapter; and if the corporation fail to pay the judgment and costs awarded against it in the proceeding, the same may be collected by execution as in other cases; but this section shall not be construed to impair or lessen, in any manner, the right the owner or owners or the trustees or school officers named in § 6439 of this chapter may have to proceed against the corporation as in all other cases of the unlawful entry upon lands. [80 v. 115; 69 v. 88, § 21.]

§ 6450. When corporation may be enjoined from occupying the land. If execution issued as provided in the last section be returned unsatisfied, in whole or in part, with the indorsement that no goods or chattels, lands or tenements, can be found whereon to levy, or if the judgment remain unsatisfied for more than sixty days from the rendition thereof, the court may, by injunction, restrain the corporation from using or occupying the lands until the judgment and costs are fully paid. [69 v. 88, § 22.]

§ 6451. Fees of witnesses, officers, probate judge—how costs taxed. The jurors summoned, and attending or serving, in accordance with the provisions of this chapter, shall each receive the same fees per day as are provided by law for jurors in the court of common pleas, and also five cents per mile for each mile of the distance they are compelled to travel in the discharge of their duties; the witnesses shall be allowed the same fees and mileage as are allowed for attendance at the court of common pleas; the sheriff shall be entitled to such fees as he is allowed by law for similar services in other cases, but he shall not be allowed anything in the way of poundage, except on money made on execution; the clerk shall be entitled to a fee of one dollar and fifty cents for drawing, and certifying to the probate judge, the list of jurors; the probate judge shall be allowed to enter a charge of five dollars in the cost bill for each day occupied in the trial of a cause, in addition to his other fees provided by law; and the whole costs so taxed shall be

adjudged against and paid by the corporation, except as provided in the next section. [69 v. 88, § 24.]

§ 6452. **When costs may be apportioned.** A corporation, by its proper officer, agent, or attorney, may, at the time of filing the petition with the probate judge, deposit with such judge such sum of money, for each separate parcel of property as it deems a just and equitable compensation for the property, rights, and interests described in the petition, and sought to be appropriated; and when the final verdict of the jury as to any parcel of property does not exceed the amount so deposited, and the owner has refused, after notice of such deposit, to accept the same, the whole costs of the proceeding as to such parcel shall be equally divided between the corporation and the owner or owners of the property; and when the final verdict as to any parcel or parcels exceeds, and as to other parcel or parcels does not exceed, the amount deposited, the probate judge shall apportion the costs in such manner as he may deem equitable and just. [69 v. 88, § 24.]

§ 6453. **To what proceedings this chapter shall not apply.** The provisions of this chapter shall not apply to proceedings by state, county, township, district, or municipal authorities, to appropriate private property for public uses, or for roads or ditches; and in all such cases it shall be optional with such authorities to pay the judgment rendered against them according to § 6432, or to pay the costs and decline to take the property sought to be appropriated. [69 v. 88, § 24.]

CHAPTER IX.

CRIMINAL.

§ 6454. **Criminal jurisdiction and in what counties.** The probate court shall have jurisdiction concurrent with the court of common pleas in all misdemeanors and in all proceedings to prevent crime in the follow-

ing counties: Cuyahoga, Lake, Lucas, Montgomery, Erie, Richland, Scioto, Holmes, Meigs, Henry, Belmont, Stark, Ottawa, Williams, Allen, Wood, Sandusky, Darke, Wyandot, Coshocton, Defiance, Portage, Clermont, Carroll, Gallia, Hocking, Brown, Lorain, Columbiana, Madison, Clinton, Shelby, Geauga, Mahoning, Jefferson, Monroe, Hancock, Adams, Highland, Licking, Knox, Miami, Fayette, Perry, Tuscarawas, Guernsey, Paulding, Greene, Lawrence, Crawford, Ashland, Washington, Athens, Pike, Summit, Hardin, Delaware, Morgan Trumbull, Logan, Morrow, Muskingum, Marion, Warren, Pickaway, Seneca, Ross, Butler, Huron, Jackson and Van Wert. [85 v. 227.]

Misdemeanors § 6795.

§ 6454 a. **Transfer to probate court of criminal business in Cuyahoga county.** In all counties in which there is a city of the second grade of the first-class, the court of common pleas may, by a special or general order entered on its journal, transfer to the probate court of such county any and all prosecutions pending therein for the punishment of misdemeanors or prevention of crime, and the same shall be proceeded with in said probate court as if the accused had been originally recognized or committed to appear therein by the examining court, and in taking recognizance in said court of common pleas for the appearance of the accused, he may be required to appear in said probate court. [82 v. 168.]

§ 6455. **Prosecution to be by information.** In no prosecutions for crimes, offenses, and misdemeanors, of which said probate court shall have cognizance, shall an indictment by the grand jury be required, but in all criminal cases brought before said court, the prosecuting attorney shall immediately file with said probate court an information setting forth briefly, but distinctly, in plain and ordinary language, the charges against the accused person, and on which charges such person shall be tried.

§ 6456. **Information shall not be quashed for error in original examination.** It shall not be lawful for said

court to quash any information filed by the prosecuting attorney, because of any defect or error in the papers or proceeding of any justice of the peace, or mayor, before whom the original examination in the case was had; provided, that no information shall be filed by any such prosecuting attorney, before such judge, for any offense not specified in the transcript from the docket of such justice of the peace or mayor. [53 v. 137, § 1.]

§ 6457. **Prosecution may begin in probate court.** The prosecuting attorney of any such county may file his information originally in the probate court, without a preliminary hearing before an examining court, upon the proper affidavits being filed therein, and the judge shall issue his warrant for the arrest of the defendant, who, when arrested, shall be taken before said judge, and thereupon, if not discharged, be recognized to appear at the next term of said court, or in default thereof to be committed to the jail of the proper county. [53 v. 137, § 2.]

§ 6458. **Amendments.** Informations may be amended at any time before or during trial, on such terms as said probate court may direct, and in all cases when such amendment is material, the defendant may elect to continue the cause. [55 v. 176, § 3; 55 v. 185, § 4]

§ 6459. **Charges to be distinctly read.** In all cases in which said probate court shall have criminal jurisdiction, when the defendant is brought before said court and after the defendant has had a reasonable time to examine the charge so preferred against him, the charge shall then be distinctly read to him, and he shall be required to plead thereto. [83 v. 26.]

§ 6460. **Pleas.** The defendant may plead—1. Guilty. 2. Not guilty. 3. A former judgment of conviction or acquittal of the offense charged, which may be pleaded either with or without the plea of not guilty. [55 v. 176, § 5.]

See § 7244-7256.

§ 6461. **Pleas, how entered and withdrawn.** Every plea shall be oral, and shall be entered on the minutes of the court, in substantially the following form: If

the defendant pleads guilty, the defendant pleads guilty of the offense charged against him; if the defendant pleads not guilty, the defendant pleads that he is not guilty of the offense charged against him; if he pleads a former conviction or acquittal (as the case may be), the defendant pleads that he has already been convicted or acquitted (as the case may be), of the offense charged against him, by the judgment of the court——, (naming it), at——, (naming the place), the day of——; said probate court may, at any time before judgment, upon a plea of guilty, permit it to be withdrawn, and a plea of not guilty substituted. [55 v. 176, § 6, 7.]

§ 6462. **Plea of not guilty—evidence.** A plea of not guilty shall be deemed a denial of every material allegation in the information; and all matters of defense tending to establish a defense, may be given in evidence under the plea of not guilty. [55 v. 176, § 8.]

§ 6463. **If defendant refuse to plead.** If the defendant refuse to answer the information, a plea of not guilty shall be entered. [55 v. 176, § 9; 55 v. 186, § 9.]

§ 6464. **Judge to try if jury not demanded.** Upon a plea, other than the plea of guilty, if the defendant do not demand a trial by jury, the judge of said probate court shall proceed to try said issue. [55 v. 176, § 10; 55 v. 186, § 9.]

§ 6465. **When jury may be demanded and trial by.** Before the court shall have received any testimony upon the trial, the defendant may demand a trial by jury, and upon such trial, the jury shall be subject to the same challenges as jurors in like cases are now subject to in the court of common pleas. [55 v. 176, § 11.]

See § 7267-7282

§ 6466. **How jury drawn and summoned.** The jury for the trial of criminal cases in the probate court, shall be drawn as for the court of common pleas, before or during any term of the said probate court, as the said probate court may order, and a venire for such jury to attend either forthwith, or on a day

named, shall be issued by the said probate court; which venire shall be served and returned in the same manner as a venire from the court of common pleas. [72 v. 9, § 13.]

§ 6467. **Recognizances and transcripts, return of—** in what court accused must appear. All recognizances which shall or may be taken by any justice of the peace in said counties, or other officers in said counties authorized to take the same, and all transcripts of criminal cases within the jurisdiction of said probate court, as defined by law, may be returned either to the probate court or the court of common pleas of said counties; and the same shall be returned to one or the other of said courts forthwith after the commitment of the person charged with the offense, or after the taking of a recognizance for his appearance before one or the other of said courts; and whichever of said courts the same may be returned to, or the accused may by the terms of the recognizance be required to appear in, the prosecuting attorney may, at his election, proceed in either of said courts with the prosecution, and the accused shall be bound to appear therein and answer to his recognizance; and on demand by the prosecuting attorney, the probate judge, or clerk of the court of common pleas, shall certify the recognizance and all other papers in the case, returned to his court by the justice or other officer, to the court in which the prosecuting attorney elects to proceed. [55 v. 176, § 12. 76 v. 110, § 14.]

§ 6468. **Monthly terms.** In the exercise of criminal jurisdiction, the probate judges shall be considered as holding monthly terms, commencing on the first Monday of each month: provided, that the county commissioners in any county where such court has jurisdiction, may, by order entered on their journal and published for three successive weeks in some newspaper printed within the county, fix its terms at longer intervals and in like manner change such order. [55 v. 176, § 13.]

§ 6469. **Effect of recognizance and when accused may be tried.** If any justice of the peace or other officer authorized to examine and hold to bail any person,

recognize such person to appear forthwith before such court, or in default of bail commit such person, and said court shall have adjourned before said recognizance shall have been entered into or commitment made, or before the same and a transcript of the proceedings shall have been filed in said probate court, said recognizance or commitment shall not thereby become void, but the defendant shall be made to answer at the next term of said court; and if said justice or other officer shall recognize or commit as aforesaid, any person to appear in said court at the next term thereof, said court being in session at the time said recognizance is entered into or commitment made and a transcript filed, said recognizance or commitment shall not thereby become void, but the defendant, appearing in said court, may, with the consent of the prosecuting attorney, be tried at the then present term of said court. [55 v. 176, § 14.]

§ 6470. **Compensation of judge: fees and fines to be paid into county treasury.** The judges of said probate courts shall be paid for their services in criminal cases such sums as the commissioners of said counties may allow, which sums shall be paid out of the county treasury of said counties, respectively, and said probate judges shall not receive any compensation by way of fees in any criminal business of which they have jurisdiction; but all costs, and all fines by said probate court imposed, including the fees of the judge, shall be collected in the same manner as fines and costs are now collected by the court of common pleas, and the same by said probate judges shall be paid into the county treasury. [55 v. 176 § 15.]

§ 6471. **Indorsement for costs and judgment thereon.** The prosecuting attorneys may, in all criminal cases prosecuted in said probate courts, require the prosecutor to indorse the information for costs, and in all cases where the name of the prosecutor is so indorsed and the defendant or defendants are acquitted, he shall be liable for the costs, and the court, at the term at which such acquittal shall take place, or any subsequent term, shall render judgment against such prosecutor for costs, unless the court shall be of opin-

ion that there was reasonable ground for instituting the prosecution. [55 v. 166, § 16.]

§ 6472. Provisions for common pleas to govern in probate court, etc. The provisions governing criminal proceedings in the court of common pleas shall, so far as applicable, govern like proceedings in the probate court.

Evidence, § 7283-7299.

Trial, § 7300-7303.

Exceptions, § 7304-7308.

Acquittal without trial, § 7309-7311.

Verdict and judgment, etc., § 7312-7317.

Sentence, § 7318-7320. Execution of sentence suspended, § 7321-7325. Execution of sentence for misdemeanor, § 7326-7329. For felony, § 7330-7337. Of death sentence, § 7338-7344.

New trials, motions in arrest and error, § 7350-7357.

MISCELLANEOUS PROVISIONS.

Clerk of common pleas and probate judge to make lists of unclaimed costs. The clerk of each court of common pleas, and each probate judge, shall, on the first Monday of January, in each year, make out two certified lists of all causes in which money has been paid, and which have remained in his hands, or any former clerk or probate judge, for a period of one year next preceding the said first Monday of January, designating the amount, and in whose hands the same is, one of which lists shall be by said clerk and said probate judge set up in some conspicuous place in his office, and the other on the door of the court-house, on the second Monday of January. [§ 1339; 58 v. 130, § 2.]

How unclaimed costs disposed of. All such advertised money (fees, costs, debts, damages, etc.), remaining in the hands of such clerk, or probate judge, at the expiration of one year from the time of such advertisement, shall be by said clerk and pro-

bate judge, or the successor of either, paid over to the treasurer of the county, indicating in each item on the docket the disposition made thereof, and every clerk and probate judge in the state of Ohio, who retired from office in the month of February, 1882, shall at once, on the passage of this act, pay over to his successor all other moneys in his hands received as such officer; and every clerk and probate judge hereafter, immediately upon ceasing to be such clerk or probate judge, shall pay over to his successor aforesaid all moneys then in his hands received as such officer; and any person entitled to any money turned into the treasury aforesaid under this section, shall, upon demand, receive a warrant therefor from the auditor, upon the certificate of the clerk or probate judge in office at the time said demand is made; and all costs certified out of the county treasury in criminal cases, and afterwards collected and paid into the hands of the clerk, or probate judge, and all fines paid into their hands, shall be by said clerk or probate judge paid into the county treasury on or before the Saturday next preceding the beginning of each term of the court of common pleas, and said clerk or probate judge shall keep a book, which shall be considered a part of the records of his office, showing in detail all the moneys paid by him into the county treasury, with proper references showing where each item may be found on the respective dockets, giving the names of the parties to whom said money belongs in alphabetical order; and no clerk or probate judge shall receive from his successor in office any fees earned by him, which shall at any time come into the hands of said successor, until the settlements required under this section are all strictly complied with. [§ 1340; 79 v. 149.]

Application to probate judge of prisoner in jail for discharge. When any person is committed to jail, charged with the commission of an offense, and wishes to be discharged from such imprisonment, the sheriff or jailer shall forthwith give to the probate judge, clerk, and prosecuting attorney of the proper county, at least three days' notice of the time of hold-

ing an examining court, whose duty it shall be to attend, according to such notice, at the court-house; the judge, having examined the witnesses, including the person charged, if such person request an examination, shall discharge the accused, if he find there is no probable cause for holding him to answer, but otherwise he shall remit him to bail, or remand him to jail; and the judge may adjourn the examination from day to day, or for such longer period as he may deem necessary for the furtherance of justice, on good cause shown by the state or the accused. [§ 7165; 66 v. 294, § 48.]

This section does not apply to persons committed on indictment, 24 O. S. 196.

Proceedings, when prisoner insane or idiot. If, at any time before the indictment of a person confined in jail, charged with an offense, notice in writing be given by any citizen to the sheriff or jailer, that such person was insane or an idiot at the time the offense was committed, or has since become insane, the sheriff or jailer shall forthwith give the notices, and an examining court shall be held, as provided in the preceding section; and if the judge find that such person was an idiot, when he committed the offense, or was then and still is insane, or afterwards became and still is insane, he shall, at his discretion, proceed as required by law after inquest held. [§ 7166; 71 v. 49, § 1; 72 v. 80, § 1]

Annual report to probate judge of unknown banking depositors and deposits. Every incorporated bank or banking association located in this state, whether now or hereafter incorporated or organized under the laws of this state or of the United States, and every company, association or person, who shall in this state keep an office or other place of business, and engage in the business of lending money, receiving money on deposit, buying and selling bullion, or bills of exchange, notes, bonds, stocks, or other evidence of indebtedness, with a view to profit, shall,

annually, between the first and second Mondays of January, make out and return to the probate judge of the county in which said bank, office, or other place of business is located, under oath of the owner, or principal officer or manager thereof, a true and complete statement, setting forth, in alphabetical order, the names of all unknown depositors with said bank, company, association or person, together with the amount due to every such unknown depositor, including accrued interest and dividends. [85 v. 65, § 1.]

Id. Who are to be deemed "unknown depositors." Every corporation, company, association, or person, in whose name a deposit of any money, bullion, bill of exchange, note, stock, bond or other evidence of indebtedness has been made with any bank, company, association, or person, designated in the first section hereof shall be deemed an unknown depositor within the meaning of this act, when the date of the last *bona fide* item of debt or credit to the account of such depositor on the books of said bank shall be more than seven years prior to the time fixed by the first section hereof for the filing of said statement with the probate court of the proper county; provided, that in fixing the date of the last item of credit to the account of any depositor, reference shall not be had to any item of credit for interest or dividends accrued on such deposit, unless the same shall be entered upon a pass-book, presented by and returned to the depositor, or unless the depositor be a minor. [85 v. 65, § 2.]

Id. Record of unclaimed deposits to be kept by probate judge. The probate judge of each county shall on or before the third Monday of January, annually, cause to be recorded in a book kept for that purpose, entitled "record of unclaimed deposits in banks, ——— county, Ohio," and which shall at all times be open to public inspection, all statements returned to him for the preceding year under the provisions of this act, and said probate judge shall designate in said book at the head of each statement recorded therein, the name of the bank, company, association or person by whom said statement is returned. The original

statement returned to said probate judge shall be kept on file and preserved in his office. [85 v. 65, § 3.]

Id. His fees for making such record; how paid. There shall be allowed and paid to the probate judge of each county, the sum of eight cents per hundred words, for all statements recorded by said probate judge under the provisions of this act; provided, that the cost of recording the names and amounts due to any depositors, by whom deposits shall be made as aforesaid after the passage of this act, and who shall thereafter become unknown within the meaning of this act, shall be paid to said probate judge by the bank, company, association, or person designated in section one hereof, at the time such annual statement is returned, and shall be by such bank, company, association, or person, deducted from the amount due such unknown depositor. [85 v. 65, § 4.]

Id. Unknown deposits to be paid into county treasury; when. Whenever any corporation, company, association, or person, in whose name any deposit is hereafter made with any bank, company, association, or person designated in section one hereof, shall become unknown within the definition and meaning of this act, the amount due to such depositor shall be by such bank, company, association or person, paid to the treasurer of the county in which such bank, company or association is located, and shall be by said treasurer credited to the general fund of said county; provided, that such deposit shall not be paid to said treasurer until after the expiration of eight years from the date of the first statement, in which the name and amount due such unknown depositor shall be returned to the probate judge as hereinbefore provided; and the bank, corporation, association or person so making such payment shall thereby be released from any claim, demand or liability to pay the same or any part thereof to the depositor, his administrators, executors or assigns. [85 v. 65, § 5.]

Id. How and by whom such deposits may be reclaimed. If at any time thereafter proof is made to the satisfaction of the probate court, or the county commis-

sioners, of the right of any person or persons, by inheritance or otherwise, to said funds or any part of the same, or paid to the treasurer under the provisions of the preceding section, said court or commissioners shall certify the same to the county auditor, who shall thereupon draw a warrant on the treasurer of the county in favor of such claimant or claimants, or the legal representatives or duly authorized agent of such claimant or claimants for the sum so paid into the treasury: provided, if any such person or persons become aggrieved by the decision, finding or action of the probate court or the county commissioners, such person or persons may appeal to the court of common pleas, by virtue of the provisions of the Revised Statutes of 1883, § 896, 6407, 6408, 6409, and 6410, respectively, and all acts amendatory and supplementary thereto and said sections shall, so far as applicable, govern proceedings had under the provisions of this act. [85 v. 65, § 6.]

Id. Penalty for bank's refusal or neglect to comply with this act. Every bank, company, association, or person designated in section one of this act, who shall neglect or refuse to comply with the provisions of this act, shall forfeit and pay five hundred dollars for every such offense. [85 v. 65, § 7.]

Id. Recovery and disposition of penalties. The penalty imposed by this act shall be recovered by action in the name of the state of Ohio, before any court of competent jurisdiction; and all penalties incurred under this act, when collected, shall be paid to the treasurer of the county in which the judgment is recovered for the same, and one-half thereof shall be by said treasurer credited to the general fund of said county, and one-half thereof shall be by him held for the use of the state of Ohio. [85 v. 65, § 8.]

Id. Who may sue; duty of prosecuting attorney. The action provided by the eighth section hereof, for the recovery of penalties incurred under the provisions of this act, may be instituted and prosecuted to judgment by any citizen of the state of Ohio; and it is hereby made the duty of the prosecuting attorney

of such county to institute and prosecute such action against every bank, company, association or person designated in the first section hereof, and located in said county, who shall fail to comply with the provisions of this act. [85 v. 65, § 9.]

Commission from Governor. Each judge of the probate court shall receive from the governor a commission to fill such office, upon producing to the Secretary of State a legal certificate of his being duly elected or appointed. [82 v. 16.]

Conditional pardon, duties of probate judge on violation of. A violation of the conditions of a pardon shall be held to be a forfeiture of the pardon, and shall render the person pardoned liable to recommitment to the penitentiary, there to serve the remainder of his sentence, as though he had not been pardoned, and in any such case of violation, the prosecuting attorney of the county in which the same occurred shall, upon the written request of the Governor, file an information thereof in the office of the probate judge of such county, whereupon such judge shall issue a warrant to the sheriff of such county, commanding him to pursue after and arrest the person named in the information, wherever he may be found within the State, and bring him into his court for examination upon the charge; he shall also demand of the warden of the penitentiary the evidence provided for by the preceding section, in cases of conditional pardon, who shall furnish the same; and if, upon such examination, the charge set forth in the information be sustained, the probate judge shall issue a warrant to the sheriff, commanding him to deliver the convict into the custody of the warden of the penitentiary to serve the remainder of his sentence, as herein provided. The probate judge shall prepare a correct bill of the costs of the arrest and examination of the convict, and certify the same under his official seal, which the sheriff shall deliver to the warden of the penitentiary, who shall allow so much thereof as he finds to be in accordance with law, and certify the same to the Auditor of State who shall draw his warrant in favor of the sheriff upon the treasurer of the State for the

payment thereof, out of the appropriation for the prosecution and transportation of convicts. The warden shall furnish each convict who receives a conditional pardon, before he leaves the penitentiary a copy of this and the preceding section of this act, and explain its provisions to him. [§ 89 a, 79 v. 122.]

Constables, duties and compensation. The probate court in any county containing a city of the first class and first grade of the second class, may appoint one or more constables who shall have the same power to call and impanel jurors which by law the sheriff of the county has, except in capital cases, and who shall receive a salary of \$800 per annum to be paid out of the county treasury on the order of the court. [85 v. 261.]

County ditch appeal, when ditch benefits lands in more than one county. When a ditch or improvement is proposed which will require a location in more than one county, or that will be beneficial to lands in more than one county, application shall be made to the commissioners of each of such counties, and the surveyor or engineer shall make a report for each county; applications for damages shall be made, and appeals from the finding of the commissioners in joint session, locating and establishing such ditch, and from the assessment of damages or compensation, shall be taken to the probate court of the county in which the greatest length of such ditch or improvement is located; a majority of the commissioners of each county, when in joint session, shall be competent to locate and establish such ditch or improvement; but no commissioner shall serve in any case in which he is personally interested; and any two commissioners may form a quorum for the transaction of business under this chapter for their respective counties. [§ 4488, 80 v. 16.]

Election of probate judge, time of. First Tuesday after the first Monday in November. [§ 2978, 83 v. 25.]

Election of real estate assessors—duties of probate judge. The returns must be made to the county auditor, who with the clerk of the court of common pleas and

probate judge of the county must open the same and declare the result. [§ 2786, 83 v. 88,

Insane asylum—duties of probate judge as to acute cases of insanity. The medical superintendent of each of the asylums shall inform the probate judge of the different counties comprising the district monthly, of the quota of patients to which each county is entitled, and the number in the asylum from said county, and the probate judge may, at any time forward an acute case, if the quota is not full, and the papers and clothing are in compliance with law. [§ 700, 81 v. 14.]

Id.—May send patient to city or county infirmary, etc. In all cases of insanity, where the probate judge in his examination has reason to believe it a first attack of the disease, and in case he can not for any cause send the patient to a regular asylum for the insane, he shall order him sent to the city or county infirmary, or to such other place as may be provided with suitable accommodations adequate to carry into effect the requirements of this act, and shall immediately order such skilled medical treatment, and proper attendance as he may deem vital for the patient, and his restoration to reason.

Id.—Directors of infirmaries to provide separate apartment—medical treatment. The board of directors of the county and city infirmaries of the State shall provide separate apartments and suitable attendance for all patients suffering from a first attack of insanity, and they shall furnish in each case such care and treatment as may be prescribed by the physician in charge, who may be either the regular physician of the infirmary or such other expert practitioner as the probate judge may select: provided, the family of such insane person may choose their own physician.

Id.—Medical report to be made to probate judge. The physician in charge shall report the condition of each patient under his treatment to the probate judge monthly, or oftener if required, giving statement of progress toward recovery, and such other information as may from time to time be asked or demanded of him, but nothing in this act shall forbid the trans-

fer of any patient to any regular insane asylum of the State at any time whenever such transfer can be effected.

Id.—Medical services—how paid. The probate judge may allow for services of the physician a sum not exceeding two dollars for each visit, which amount and all other expenses for the care of patient as herein provided, shall when approved by the probate judge, be paid out of the poor or infirmary fund of the city or county, the same as in other cases. [81 v. 102.]

Interpreter in probate court, Hamilton County. The interpreter appointed by the common pleas court, Hamilton county, shall without extra compensation render service in the probate court. [§ 472.]

Joint sub-district—dissolution or alteration—appeal. No joint sub-district which is now organized or may hereafter be organized, shall be dissolved, changed or altered, unless by the concurrent action of the boards of education of the several townships having territory included therein: provided, however, that when any board of education in a joint sub-district desires to dissolve, change or alter the same, the board of education desiring such dissolution, change or alteration, shall notify in writing, the boards of education interested, of the time when they will meet to consider the proposed dissolution, change or alteration. The place of meeting shall be at the school-house in such joint sub-district, but if there be none, then at some convenient place in the vicinity of such joint sub-district. If the joint boards fail to meet, or having met, can not agree upon a dissolution, change or alteration, as the case may be, then the board of education, desiring such dissolution, change or alteration, may appeal to the probate court of the proper county, and the same proceedings shall be had as in case of appeals in the formation of joint sub-districts, so far as applicable as provided in § 3935–3941; and any joint sub-district established by proceedings in the probate court may be dissolved, changed or altered, as provided in this section, at any time after the expiration of five years. [§ 3950, 84 v. 117.]

Parent and child. No child under the age of three years shall be separated from its mother, if such mother be an inmate of the county infirmary, or shall be declared a pauper, unless with the approval of the probate court first given. [85 v. 148.]

Salaries of probate judges of Hamilton and Cuyahoga counties. The salary of the probate judge of Hamilton county is five thousand dollars, paid quarterly out of the fee fund upon the warrant of the county auditor. [§ 1345, 77 v. 138.] The salary of the probate judge of Cuyahoga county is five thousand dollars paid in monthly installments. He can not receive any additional compensation from any source. The deputy of the probate court of this county is allowed a salary of not more than two thousand and not less than fifteen hundred dollars, but no other deputy, clerk or employe shall be allowed more than twelve hundred dollars. All fees, costs, etc., must be paid into the county treasury. [85 v. 69-71.]

School examiners appointed by probate court. There shall be a board of examiners for each county, which shall consist of three competent persons, to be appointed by the probate judge; such persons shall be residents of the county for which they are appointed, and shall not be connected with or interested in any normal school or schools for the special education or training of persons for teachers; if an examiner becomes connected with or interested in any such school, his office shall become vacant thereby; the term of office of such examiners shall be three years; the term of one of the examiners shall expire on the 31st day of August each year; but the probate judge may revoke the appointment of any examiner upon satisfactory proof that he is inefficient, negligent or guilty of immoral conduct; when a vacancy occurs in the board, whether from expiration of the term of office, refusal to serve, or other cause, the probate judge shall fill the same by appointment for the full or unexpired term, as the case demands; and within ten days after an appointment, the probate judge shall report to the commissioner of common schools the name and post-office of the appointee, and whether

the appointment is for a full or unexpired term ; and no person shall be appointed to the position or exercise the office of State, county, city or village examiner of teachers who is the agent of or is interested in any book-publishing or book-selling firm, company or business. [§ 4069, 85 v. 330.]

Seal of probate court. The seal of the probate court must be one inch and three-fourths in diameter and surrounded by these words "Probate court, _____ county, Ohio," (*insert the name of the proper county,*) [§ 16.]

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